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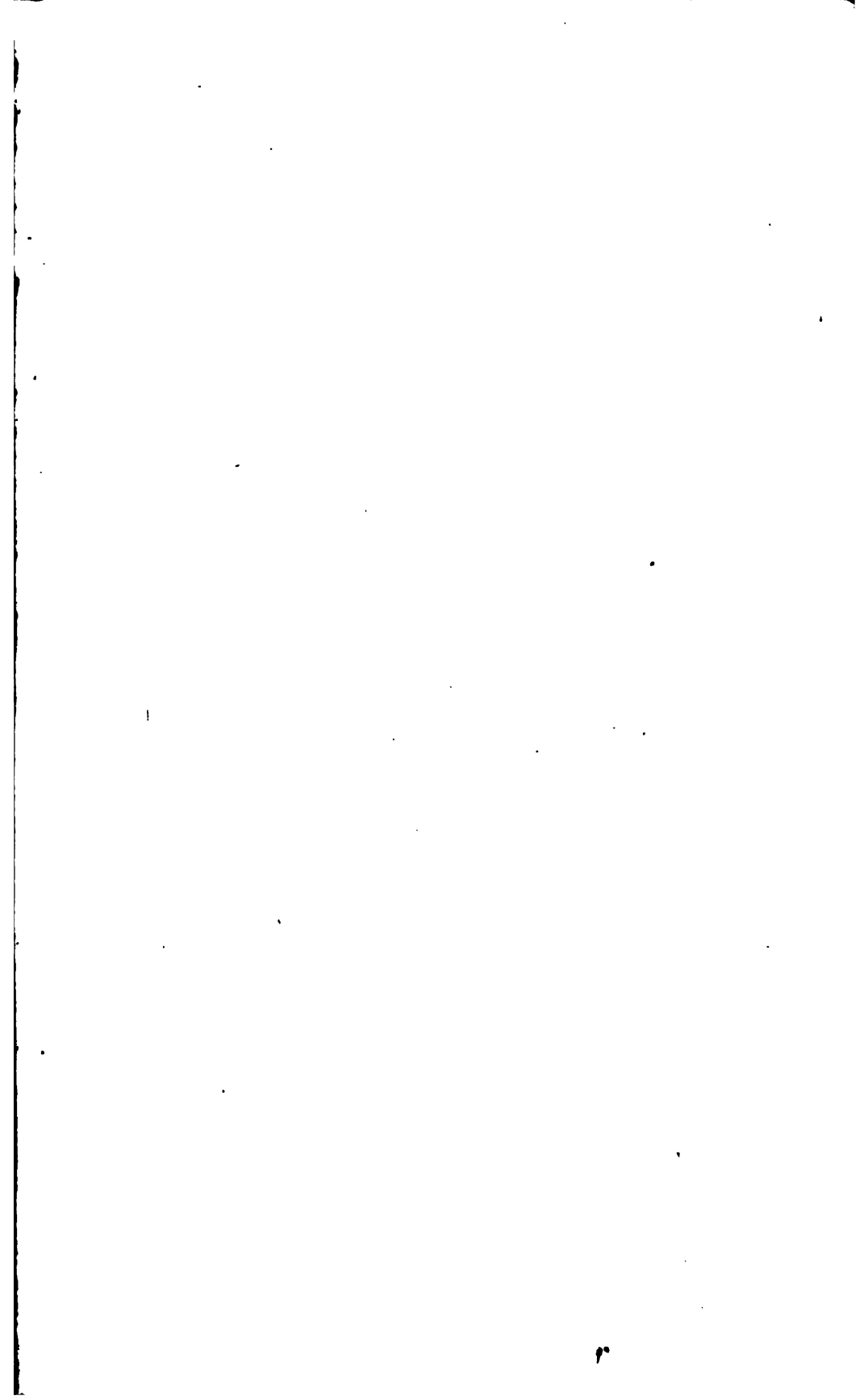
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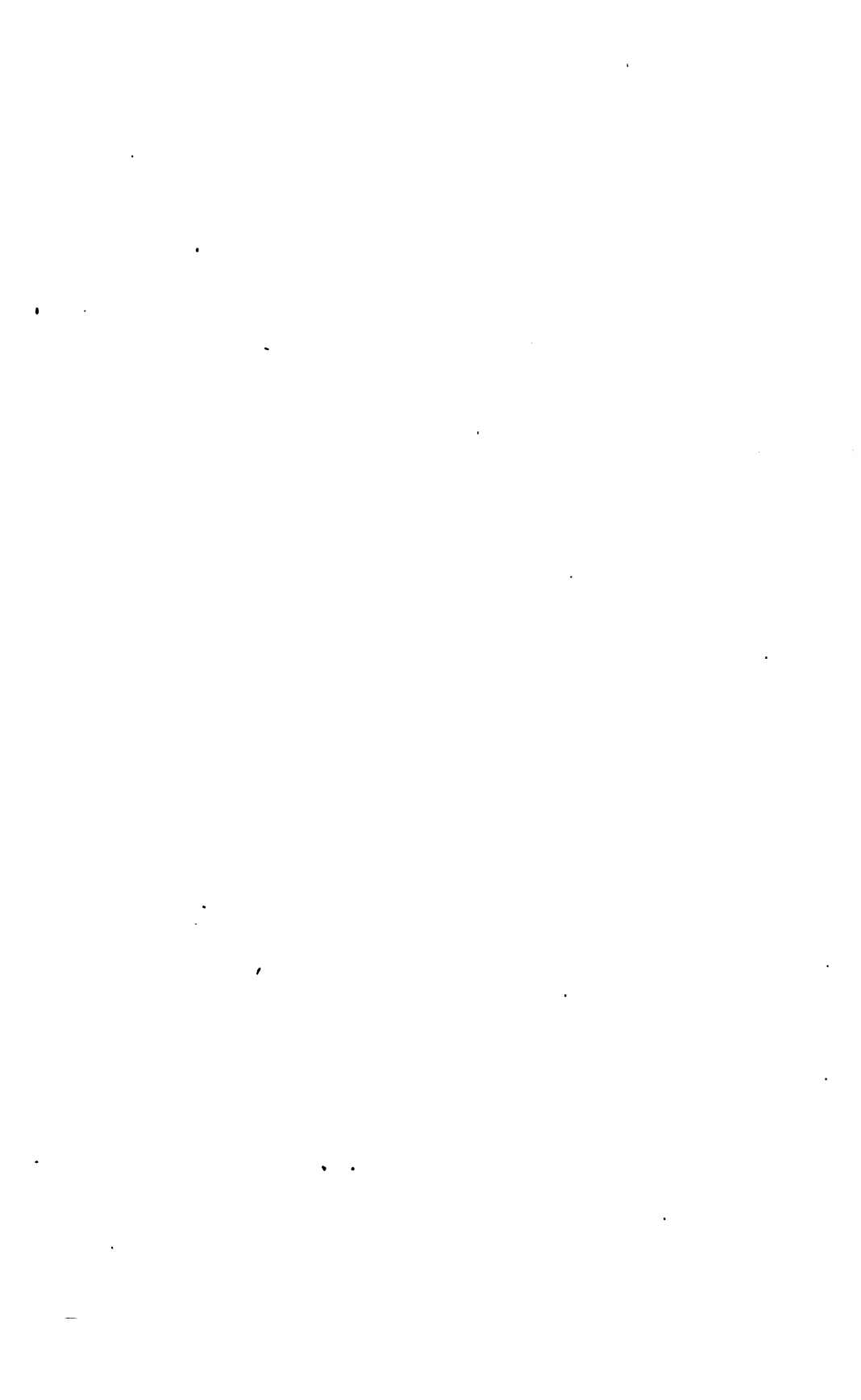
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OF THE

STATE OF NEW YORK,

FROM AND INCLUDING DECISIONS OF MARCH 5, 1889, TO AND
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WITH

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**CHARLES RAPALLO HENDERSON, as Executor, etc., Appellant,
v. JOHN C. HENDERSON, Respondent, et al., Appellants.**

The will of H., after authorizing and directing his executor to "partition, divide and apportion" his residuary estate among his children living at the time of such partition, and the issue of any child or children who had died leaving issue, provided as follows: "And I do hereby give, devise and bequeath to each of my said children the share or portion of my said estate so to be partitioned, divided and apportioned to them, respectively, as aforesaid. * * * If any of my children shall die without issue before such partition and division shall be made, then I give the portion of such deceased child equally to the brothers and sisters of such deceased child. * * * If any of my said children shall die leaving issue, then the child or children (who shall be living at the time of such partition) of such deceased child of mine shall take and have the share or portion which the parent would have if living. * * * It is my will that my executor make the partition * * * as soon after my decease as practicable, having reference to the condition of my estate; but as he may find it necessary to realize upon securities, and sell and convert into money both real and personal property, * * * which he may not be able speedily to make without sacrifice and loss to my estate, he shall not be compelled to make such partition, etc., * * * until after the lapse of five years from the probate of this will." The executor was directed, until the partition of the estate, to pay \$2,400 per annum to each of the children from the testator's decease, and to charge the payment to the child as part of his or her share of the estate. The executor was authorized to take entire charge of all the real and personal estate, to lease, collect rents, insure, repair, make investments, pay taxes, etc. All of the testator's children were living and of full age at

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the time of his decease. In an action for the construction of the will, *held*, that no valid express trust was created by the will, and the legal title to the real estate vested in the testator's children at his death, subject to the power given the executor to partition: that the direction to partition, etc., although ineffectual to create a valid trust, could be upheld as a power in trust.

A trust estate will not be implied when to do so will make the will conflict with the statute, and when the duties imposed upon the executor may be executed under a trust power.

Also, *held*, that no unlawful perpetuity was created by authorizing the executor to delay partitioning the estate for five years, as the power of sale was not suspended; and that there was no equitable conversion of the realty into personalty, the power of sale not being absolute.

Also, *held*, that one or more of the testator's children could not maintain an action for partition pending the existence of the right in the executor to exercise his powers.

Also, *held*, that the provision restricting the limitation over to such of the issue of a deceased child as "shall be living at the time of such partition," was void, as it would prevent the absolute vesting of the share in the issue of a deceased child at the time of the parent's death; but as it was inconsistent with the earlier provisions of the same clause, and unnecessary, so far as the perfecting of a testamentary scheme for disposing of the residuary estate is concerned, it should not be allowed to prevail over the preceding direction, when by cutting it off and disregarding it as a void direction, the will could be effectuated according to the plain and just intent of the testator.

If the principal disposition of a will can be upheld, ulterior, contingent limitations, which threaten violation of statutory rules respecting the ownership of property, if separable from the principal dispositions, may and should be disregarded.

The appeal was from an order of the General Term, which reversed the judgment of the Special Term and granted a new trial. The respondent moved for a dismissal of the appeal on the ground that the order was not appealable. The appellant, in the notice of appeal, assented to the rendition of judgment absolute against him if the order was affirmed. *Held*, that this gave the court jurisdiction to entertain the appeal, and although judgment would have been more appropriately ordered under the decision of the General Term, in a case on the equity side of the court involving the construction of a will, as the awarding of a judgment absolute would work no prejudice, motion denied.

Henderson v. Henderson (46 Hun, 509) reversed.

(Argued February 8, 1889; decided March 5, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order

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made December 13, 1887, which reversed a judgment construing the will of John C. Henderson, deceased, entered upon a decision of the court on trial without a jury.

The material facts are stated in the opinion.

S. F. Rawson for plaintiff, appellant. The court should have endeavored to sustain the will. (*DuBois v. Ray*, 35 N. Y. 162; *Post v. Hover*, 33 id. 601; *Harrison v. Harrison*, 36 id. 543; *Roseboom v. Roseboom*, 81 id. 356; *Van Nostrand v. Moore*, 52 id. 12; *Van Vechten v. Keator*, 63 id. 52; *Ozley v. Lane*, 35 id. 340; *Savage v. Burnham*, 17 id. 572; *Jarman on Wills*, 257; *Timpson's Estate*, 15 Abb. [N. S.] 230.) There is an absolute and immediate gift to the children, and the time for division is not postponed an instant by the will. The direction of the will is for immediate sale and for division, subject only to the limitation that the executor may "await a more favorable market." (*Brewer v. Brewer*, 11 Hun, 147; *Brewer v. Penneman*, 72 N. Y. 603; *Heermans v. Robertson*, 64 id. 332; *Brewster v. Striker*, 2 id. 19; *Tucker v. Tucker*, 5 id. 409; *Ward v. Ward*, 105 id. 68; *Garvey v. McDevitt*, 72 id. 556; *Hobson v. Hale*, 95 id. 588; *Robert v. Corning*, 89 id. 237; *Ham v. Van Orden*, 84 id. 257; *Manice v. Manice*, 43 id. 303.) The power of sale in this will as a naked power is valid, and effectual to estop partition until cut off. (*Robert v. Corning*, 89 N. Y. 237; *Catton v. Taylor*, 42 Barb. 578; *Blanchard v. Blanchard*, 6 N. Y. S. C. R. [T. & C.] 551; *McGregor v. McGregor*, 22 Week. Dig. 305; *Prentice v. Jansen*, 79 N. Y. 482; *Hetzel v. Barber*, 69 id. 7, 12; *Kinnier v. Rogers*, 42 id. 53; *Jarman on Wills*, 536; Code, § 1537; *Voessing v. Voessing*, 12 Hun, 678; *McKeon v. Kearney*, 57 How. 349; *Van Schuyver v. Mulford*, 59 N. Y. 426; *Chipman v. Montgomery*, 63 id. 221; *Weed v. Weed*, 94 id. 243, *Theirs v. Theirs*, 98 id. 568; *Drake v. Drake*, N. Y. Daily Reg., Oct. 9, 1886; *Sullivan v. Sullivan*, 66 N. Y. 37; *Morse v. Morse*, 85 id. 53.) The power of alienation is not illegally suspended. (*Kinnier v. Rogers*, 42 N. Y. 535; *Crittenden v. Fairchild*,

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41 id. 289; *Post v. Hover*, 33 id. 593; *Downing v. Marshall*, 23 id. 366; *Robert v. Corning*, 89 id. 225; *Stewart v. Hamilton*, 37 Hun, 19; *Hillyer v. Vandewater*, N. Y. Spec. Term, 1888.) The shifting of the beneficiaries provided for by the sixth clause of the will is a valid provision and does not tend to suspend the power to alienate the estate. (*Van Derzee v. Slingerland*, 103 N. Y. 47; *Beardsley v. Hotchkiss*, 96 id. 201; *Cooke v. Platt*, 98 id. 35; *Robert v. Corning*, 89 id. 225; *Morse v. Morse*, 85 id. 53.) The words of gift here are almost identical with *Nellis v. Nellis* (99 N. Y. 513); *Buel v. Southwick* (70 id. 581). (*In re N. Y. L. & W. R. R. Co.*, 105 N. Y. 89, 92; *Kelso v. Lorillard*, 85 id. 177; *Vanderzee v. Slingerland*, 103 id. 47; *Manice v. Manice*, 43 id. 303; *Robert v. Corning*, 89 id. 225; Lewis on Perp. chap. 28, 531, 554; Gray on Perp. 306, § 476; Wash. on R. Prop. 332, 625.) As there was a valid trust created by the fifth subdivision of the sixth clause of the will, as to any who were minors at the time of testator's death, the will must be upheld as a whole. (*Van Schuyver v. Mulford*, 59 N. Y. 426; *McKeon v. Kearney*, 54 How. 349; *Jost v. Jost*, 22 Alb. L. Jour. 135; *Robert v. Corning*, 89 N. Y. 237; *Cooke v. Platt*, 98 id. 35; *Konvalinka v. Schlegel*, 104 id. 130; *Chamberlain v. Taylor*, 105 id. 185, 192; 2 R. S. 1116 [Bank's 6th ed.] § 128; *Reed v. Underhill*, 12 Barb. 113; *Skinner v. Quinn*, 43 N. Y. 99.) A power to partition and divide is good in law. (*Craig v. Craig*, 3 Barb. Ch. 98; *Root v. Stuyvesant*, 18 Wend. 265; Sugden on Powers, 538; *Shannon v. Picke'l*, 2 N. Y. State Rep. 160.)

Edward S. Rapallo for defendants, appellants. The provisions of the will do not unlawfully suspend the power of alienation of the real estate, whether the will be regarded as creating a trust with title in the executor or as granting to the executor certain powers in trust. (*Robert v. Corning*, 89 N. Y. 225, 239; *Blanchard v. Blanchard*, 4 Hun, 287; 70 N. Y. 615; *Hobson v. Hale*, 95 id. 588; *Knox v. Jones*, 47 id. 389, 398; *Schettler v. Smith*, 41 id. 328; *Tiers v. Tiers*,

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98 id. 568; *Harrison v. Harrison*, 36 id. 543, 547; *Haxton v. Corse*, 2 Barb. Ch. 506; *Darling v. Rogers*, 21 Wend. 483, 488; *Kennedy v. Hoy*, 105 N. Y. 134; *Van Schwyver v. Mulford*, 59 id. 426; *Ward v. Ward*, 105 id. 68; *Savage v. Burnham*, 17 id. 561, 566.) The shares must be regarded as vested at testator's death. (*Warner v. Durant*, 76 N. Y. 133; *Everett v. Everett*, 29 id. 39, 75, 76; *Radley v. Kuhn*, 97 id. 26; *Beekman v. Bonsor*, 23 id. 298.) The power given to the executor to partition the land is valid, irrespective of the validity of the power to sell or to collect the rents; this power to partition is not rendered invalid by the provision that its exercise cannot be compelled within five years. The powers to sell, to partition and to possess and collect the rents and profits, taken together, in connection with each other, are valid. (*Crittenden v. Fairchild*, 41 N. Y. 289; *Hetzel v. Barber*, 69 id. 1; *Downing v. Marshall*, 23 id. 366, 379.) No devise of the estate by implication, upon an express trust, with title in the executor, should be construed from the terms of the will, if the result of such interpretation would be a void trust, created by implication. (*Robert v. Corning*, 89 N. Y. 225, 239; *Cooke v. Platt*, 98 id. 36; *Downing v. Marshall*, 23 id. 366; *Brewster v. Striker*, 2 id. 19; *Konvalinka v. Schlegel*, 104 id. 125; *De Kay v. Irving*, 5 Denio, 646; *Haxton v. Corse*, 2 Barb. Ch. 506, 519; *Post v. Hover*, 33 N. Y. 593, 599, 601; *Smith v. Edwards*, 88 id. 102.) The executor and six of the defendants appealed from the decision of the General Term, yet any of the parties had a right to take this appeal, and the construction of this will by this court will be binding upon all, under the conditions presented by the pleadings. (*Ward v. Ward*, 105 N. Y. 69; *Williams v. W. U. T. Co.*, 93 id. 194.)

Francis Forbes for John C. Henderson, respondent. The ultimate disposition of the property upon the partition and distribution provided for in the will is void. (*Cook v. Lowry*, 95 N. Y. 104, 108, 111; *Hutton v. Benkard*, 92 id. 295; 1 R. S. 773, § 2; Id. 722, §§ 7, 10, 13; *Smith v. Edwards*, 88

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N. Y. 92; *Hobson v. Hale*, 95 id. 588, 610, 611; *Vanderzee v. Slingerland*, 103 id. 47, 55; *In re N. Y. L. & W. R. R. Co.*, 105 id. 89; *Avery v. Everett*, 110 id. 317; *Leake v. Robinson*, 2 Mer. 363, 381, 384; *In re Sanderson*, 3 K. & J. 507, 508, 509; *Watson v. Hayes*, 5 My. & C. 125; *Livesey v. Livesey*, 3 Russ. 287; 1 Jarman on Wills [Bigelow's ed. 1881] 844, 845, 854; Tudor's Lead. Cas. on Real Prop. [1st ed.] 361; [2d. Eng. ed.] 465, note; *Curtis v. Lukin*, 5 Beav. 147; *Robert v. Corning*, 89 N. Y. 225; *Cooke v. Platt*, 98 id. 35.) The will did not create a valid trust. (*Cooke v. Platt*, 98 N. Y. 35, 37, 38, 39; *Heermans v. Burt*, 78 id. 259; *Konvalinka v. Schlegel*, 104 id. 125, 130; *Chamberlain v. Taylor*, 105 id. 185, 192; Revisers on the Articles of Uses and Trusts, 5 N. Y. Stat. [Edmund's ed.] 581; 2 Story Eq. Jur. § 1064a; 2 Williams on Executors, 1360 [Perkins Am. ed. 1463]; *Delaney v. Van Aulen*, 84 N. Y. 16; *Lang v. Ropke*, 5 Sandf. 363, 371; *Hoes v. Van Hoesen*, 1 N. Y. 120; *Kelsay v. Western*, 2 id. 500.) The powers attempted to be conferred upon the executor and his associate by the will cannot be sustained as powers in trust. (*Ward v. Ward*, 105 N. Y. 68; *Garvey v. McDevitt*, 72 id. 556; *Van Nostrand v. Moore*, 52 id. 12; *Tobias v. Ketchum*, 32 id. 319, 330; *Beekman v. Bonsor*, 23 id. 298; *Leggett v. Perkins*, 2 id. 319; *Brewster v. Striker*, Id. 19, 34; *Wood's Case*, 38 Barb. 483; *Anderson v. Mather*, 44 N. Y. 259; *Bennett v. Garlock*, 79 id. 317, 320.) The will discloses a clear intention that the executor should have the legal estate in the lands. (*Robert v. Corning*, 89 N. Y. 225; Jarman on Wills, 465; *Downing v. Marshall*, 23 N. Y. 366; *Post v. Hover*, 33 id. 593; *Tucker v. Tucker*, 5 id. 408; *Van Nostrand v. Moore*, 52 id. 12, 17; *Brewster v. Stryker*, 2 id. 19; *Tobias v. Ketchum*, 32 id. 319; *Beekman v. Bonsor*, 23 id. 298; *Leggett v. Perkins*, 2 id. 297; *Garvey v. McDevitt*, 72 id. 576; *Ward v. Ward*, 105 id. 68.) The power in trust upheld by the Special Term is void. (*Benedict v. Webb*, 98 N. Y. 460, 463, 467.) The scheme of the will, whether construed as creating a trust or a system of powers in trust, is void. (1 R. S. 730, §§ 63-65, 107; Id. 732, §§ 77, 78-94;

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Downing v. Marshall, 23 N. Y. 366, 376, 380; *Jennings v. Jennings*, 7 id. 547; *Schettler v. Smith*, 41 id. 328; *Dungannon v. Smith*, 12 C. & F. 546, 639, 640; *Hawley v. James*, 16 Wend. 62, 132; *Gee v. Audley*, 1 Cox, 324; *In re Sayer's Trusts*, 6 L. R., Eq. 319; Note to *Cadell v. Palmer*, Tudor's Lead. Cas. on Real Prop. [3d. ed.] 465; Schouler on Wills, § 21; Lewis on Perpetuities, 170, 481; *Loring v. Blake*, 98 Mass. 253; *Rose v. Rose*, 4 Abb. Ct. App. Dec. 108; *Amory v. Lord*, 9 N. Y. 503; *Tiers v. Tiers*, 98 id. 568; *Hone v. Van Schaick*, 20 Wend. 564; *Killam v. Allen*, 52 Barb. 605; *Brewer v. Brewer*, 11 Hun, 147; 72 N. Y. 603; *Hobson v. Hale*, 95 id. 588, 609.) The residuary devise is void as an entirety. (1 Redf. on Wills, 426, 429; *Leake v. Robinson*, 2 Mer. 363-390; *Kennedy v. Hoy*, 105 N. Y. 137; *Hawley v. James*, 16 Wend. 174; *Amory v. Lord*, 9 N. Y. 403; *Knox v. Jones*, 47 id. 389; *Van Schruyver v. Mulford*, 59 id. 432; *Benedict v. Webb*, 98 id. 463.) It is not proper or permissible in the case of a complicated equity suit, where the rights of all the parties are jointly involved, to take such an appeal. In such a case judgment absolute, which must necessarily affect all the parties to the suit, and which must affect them differently and really decide their respective rights and liabilities, cannot be rendered upon a stipulation of a single party. (*Lane v. Wheeler*, 101 N. Y. 17, 18; *Lanman v. R. R. Co.*, 18 id. 493, 494; *Hitchings v. Van Brunt*, 38 id. 335.) Where it is impossible for a judgment absolute to be rendered against the appellant there can be no appeal under this section 191 of the Code of Civil Procedure. (*People v. Thacher*, 55 N. Y. 525; *Hitchings v. Van Brunt*, 38 id. 335; *Cobb v. Hatfield*, 46 id. 533; *Godfrey v. Moser*, 66 id. 250; *Lake v. Nathans*, 67 id. 589; *Hiscock v. Harris*, 80 id. 402; *Lanman v. Lev. R. R. Co.*, 18 id. 493; *Johnson v. A. & S. R. Co.*, 54 id. 416; *Williams v. W. U. T. Co.*, 93 id. 162, 194; *McCree v. Conger*, 77 id. 432.)

Joseph O. Brown, guardian *ad litem*, for *Harriet Gertrude Outerbridge*, respondent. By the tenth article of his will, the testator gives to the executor every power that such

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executor could possibly have exercised if he had by express words been appointed a trustee. (*Perry on Trusts*, § 313; *Brewster v. Stryker*, 2 N. Y. 19; *Morse v. Morse*, 85 id. 60; *Bean v. Bowen*, 47 How. Pr. 306; *Ward v. Ward*, 23 Week. Dig. 466; *S. C.*, 105 N. Y. 68; *Hill on Trustees*, * 231; *Morse v. Morse*, 85 N. Y. 53.) The executor took the legal estate. (*Bradstreet v. Clark*, 12 Wend. 602; *Smith v. Edwards*, 88 N. Y. 92, 104; *Warner v. Miller*, 76 id. 136.) Even if there were no trust and the estate vested at death of testator, still the residuary clause of the will is void. (*Schettler v. Smith*, 41 N. Y. 328, 335.) The attempt of the testator to create a trust in the executor has failed. There is a suspension of alienation for more than two lives in being at the time of the creation of the estate. (1 R. S. 726, § 37; 7 id. 2179.)

Kelly, Tucker & Henderson for H. G. & L. O. Henderson, respondents. The direction for a future apportionment did not vest the estate. (*Smith v. Edwards*, 88 N. Y. 92; *Hobson v. Hale*, 95 id. 615.) A devise to a class, some of the members of which cannot be ascertained until after the expiration of a period, which period is in no way limited by any designated life, is void. (*Pearks v. Mosley*, L. R., 5 App. Cas. 714; *Leake v. Robinson*, 2 Mer. 363; *Smith v. Edwards*, 88 N. Y. 104.) As there is no direction to apply the rents and profits of the estate to the use of any person, or for any period, or to accumulate them, no trust is created as to them. (1 R. S. 2181, § 55; *Cooke v. Platt*, 98 N. Y. 35; *Heermans v. Burt*, 78 id. 258; *Smith v. Edwards*, 88 id. 103; *Beardsley v. Hotchkiss*, 96 id. 213; *Radley v. Kuhn*, 97 id. 35.)

GRAY, J. The questions, which this appeal brings before us for review, relate to the validity of the disposition which was made by this testator of his residuary estate. The sixth clause of his will provides as follows: "All the rest, residue and remainder of my estate, both real and personal, and wheresoever situated, I hereby authorize, empower and direct my executor to partition, divide and apportion equally among

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all my children living at the time of making such partition and division, and the child or children of such of my children as may then be dead, leaving issue. * * * And I do hereby give, devise and bequeath to each of my said children the share or portion of my said estate so to be partitioned, divided and apportioned to them respectively, as aforesaid. * * * Provided, nevertheless, that if any of my children shall die without issue before such partition and division shall be made, then I give the portion of such deceased child equally to the brothers and sisters of such deceased child. And provided, further, that, if any of my said children shall die leaving issue, then the child or children (who shall be living at the time of such partition) of such deceased child of mine shall take and have the share or portion which the parent would have taken if living. * * * It is my will that my executor make the partition, division and apportionment aforesaid as soon after my decease as may be practicable, having reference to the condition of my estate; but as he may find it necessary to realize upon the securities and sell and convert into money both real and personal property, and make other changes in my estate in order to make equitable and proper partition, and which he may not be able speedily to make without sacrifice and loss to my estate, he shall not be compelled to make such partition, division and apportionment until after the lapse of five years from the date of probate of this will."

By the ninth clause the testator directs his executor, until the partition of the estate, to pay over to each of the children \$2,400 per annum, quarterly, from his decease, and to charge the payment to the child as a part of his or her share of the estate. In the tenth clause, he authorizes his executor to take entire charge, control and management of all the real and personal estate; to lease; to collect the rents, issues and profits and income; to make investments; to insure; to pay taxes and assessments; to make repairs; to pull down buildings and erect new ones, etc.

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The judgment of the Special Term, sustaining the testamentary disposition of the residuary estate, was reversed at the General Term; but while the two learned judges, who sat in review, in that court, agreed in reversing, they differed in their mode of reasoning out that result. Judge BARNARD thought that the will gave to the executor an estate in the lands, until actual partition, and no estate in possession could be given; that if the will is good to vest the executor with the title in trust, which may extend for an absolute term of five years, there was no one in being who could give a title until after that period has passed, or until the executor chose to partition the land. Judge GULLEN, however, accepting the authority of *Robert v. Corning* (89 N. Y., 225), held, that even if the will created a trust in the executor, that fact alone would not create a suspension of the power of alienation; since the executor may, at any time within the five years, convey a good title to the land by sale; or by the partition and division among the devisees. But he thought that there was a distinction between the cases; in that, in the present one, the absolute ownership of personal property might be suspended by the limitations of the will for more than the statutory period. The limitations, to which he refers, are in the second proviso in the sixth clause, by which the issue of a deceased child of testator, *who shall be living at the time of the partition*, are substituted in the place of the parent. He also thought that there was an illegal disposition of the real estate, in the creation of a contingent remainder upon a term of years, in which the contingency was of such a nature that the remainder could not vest in interest during the continuance of the statutory period of two lives in being.

We do not think that any valid express trust was created by the testator; for, if such was his intention, it would be ineffectual for not being comprehended within the provisions of section 55 of the article on uses and trusts in the Revised Statutes. The main purpose of testator's will was that his children should participate equally in his residuary estate, and that its division among them should be effected by his executor. For the

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better execution of that purpose, he gave a discretionary power of sale to the executor, and the further power to manage the estate and to receive the rents, profits and income thereof is conferred, until partition and division. There is no express devise of the residuary estate to any one, and, if no valid trust title was created in the executor, it must follow that the legal title to the real estate vested in the children at the testator's death, subject to the power given to the executor to partition and, meanwhile, to manage and sell.

In its features this case resembles *Cooke v. Platt* (98 N. Y. 36), where there was an express devise to the executors, which was held ineffectual as constituting a valid trust, because it was not upon one of the express trusts authorized by statute. The declared purpose in that case was to divide the estate among the children through the executor, and a discretionary power to sell was conferred. It was there held that the trust could not be sustained as one to receive the rents and profits of the land, under the third subdivision of section 55, because there was no direction to apply them to the use of any person for any period. And it was said that "the statute does not authorize the creation of a trust for the partition of lands. But a power may be created for that purpose, and a devise to the executors, though void as a trust, may be valid as a power to distribute and divide." It was held in the same case that it was essential to the constitution of a valid trust, if the purpose be to sell lands for the benefit of creditors and legatees, that the power of sale should be absolute and imperative, without discretion, except as to the time and manner of performing the duty imposed. "The sale or other disposition mentioned in the statute must be the direct and express purpose of the trust."

However convenient to the executor the possession of the legal title to the estate might be, in order to carry out the testator's purpose, a trust estate should not be implied, when to do so would make the will conflict with the statute and when the duties imposed upon the executor could be executed under a trust power. (*Post v. Hover*, 33 N. Y. 601; *Heermans*

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The judgment of the Special Term, sustaining the testamentary disposition of the residuary estate, was reversed at the General Term; but while the two learned judges, who sat in review, in that court, agreed in reversing, they differed in their mode of reasoning out that result. Judge BARNARD thought that the will gave to the executor an estate in the lands, until actual partition, and no estate in possession could be given; that if the will is good to vest the executor with the title in trust, which may extend for an absolute term of five years, there was no one in being who could give a title until after that period has passed, or until the executor chose to partition the land. Judge CULLEN, however, accepting the authority of *Robert v. Corning* (89 N. Y., 225), held, that even if the will created a trust in the executor, that fact alone would not create a suspension of the power of alienation; since the executor may, at any time within the five years, convey a good title to the land by sale; or by the partition and division among the devisees. But he thought that there was a distinction between the cases; in that, in the present one, the absolute ownership of personal property might be suspended by the limitations of the will for more than the statutory period. The limitations, to which he refers, are in the second proviso in the sixth clause, by which the issue of a deceased child of testator, *who shall be living at the time of the partition*, are substituted in the place of the parent. He also thought that there was an illegal disposition of the real estate, in the creation of a contingent remainder upon a term of years, in which the contingency was of such a nature that the remainder could not vest in interest during the continuance of the statutory period of two lives in being.

We do not think that any valid express trust was created by the testator; for, if such was his intention, it would be ineffectual for not being comprehended within the provisions of section 55 of the article on uses and trusts in the Revised Statutes. The main purpose of testator's will was that his children should participate equally in his residuary estate, and that its division among them should be effected by his executor. For the

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better execution of that purpose, he gave a discretionary power of sale to the executor, and the further power to manage the estate and to receive the rents, profits and income thereof is conferred, until partition and division. There is no express devise of the residuary estate to any one, and, if no valid trust title was created in the executor, it must follow that the legal title to the real estate vested in the children at the testator's death, subject to the power given to the executor to partition and, meanwhile, to manage and sell.

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v. *Robertson*, 64 N. Y. 332.) The direction to the executor to partition, divide and apportion the residuary estate, though ineffectual to create a valid trust, may be upheld as a power in trust.

There is nothing in the will, which makes it absolutely necessary to imply a trust; because everything, which the executor is called upon to do, may be performed, either in that capacity, or as the donee of a power in trust. He is not required to distribute from the income, but to advance from the capital to the children, and his duties of management of the estate, of realizing upon the same by sale for the purpose of partitioning and apportioning, may be lawfully performed by him under a power in trust. The power of sale was in no wise suspended by the provision in the sixth clause directing that the executor should not be compelled to make partition, division and apportionment until after the lapse of five years from the date of probate of the will. The reason furnished by the will for this direction is that, owing to the condition of his estate and the possible necessity of having to convert into money the realty and personalty composing it, the executor might not be able to do it speedily without entailing sacrifice and loss. The decision of this court in *Robert v. Corning* (89 N. Y. 225) is in point. Under the will in that case the executors were directed to sell the residuary estate and from the proceeds were to distribute it in certain parts among the children; but they were empowered to delay a sale for not exceeding three years. It is there said in the opinion that "the mere fact that it might be the duty of the executors, in the exercise of their discretion, to postpone the sale to await a more favorable market does not, we think, constitute such a restraint as suspends the power of alienation within the statute." There was no unlawful perpetuity created by authorizing the executor to delay partitioning the estate, because the power of sale was not suspended. He could sell and convey an absolute fee in possession at any time after testator's death. He was a person in being, who could at any time sell the real estate, or give title by partition among the testator's children, without con-

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travening the powers in trust which were conferred upon him.

At testator's death all of his children survived him and were of full age, and, if necessary, they could have united with the executor in a conveyance of the real estate; and, if an immediate conveyance and payment were to be made, they could take at once from the executor. The powers of partition and of sale being valid, however, the children of testator took their interests at his death subject to their exercise, and, hence, one or more of them could not maintain any compulsory partition proceedings, pending the existence of the right in the executor to exercise his powers. Although there is no present express devise to the children of the residuary estate, but only the direction to the executor to divide and apportion it among them, if they were alive at the time of distribution, we think their interests must be considered as having vested at the testator's death. Such would be the result from the fact that no valid trust estate has been created in the executors, and such would be fairly inferable as an intention of the testator from his language in the sixth clause, where he says: "I do hereby give, etc., to each of my said children the share or portion of my estate so to be partitioned, etc., as aforesaid." The time of conveyance of the realty to and of the distribution of the personalty among the children is postponed, only, but that is not inconsistent with the vesting of the undivided shares. We regard that language as disposing of the suggestion that time was of the substance of the gift.

Nor is any insuperable difficulty created, in this case, in the existence of any ulterior, contingent limitation in the sixth clause. The language referred to is, "and provided, further, that if any of my said children shall die leaving issue, then the child or children (who shall be living at the time of such partition) of such deceased child of mine shall take and have the share or portion which the parent would have taken, if living." The primary intention of testator was to give to his immediate children the absolute title to their shares;

subject to a limitation over to their issue, in case of their death before the period of actual partition of the estate. That was the limitation of a future, contingent estate, but it was one which would not prevent the ultimate vesting of the share beyond the life of his child. The interest in the lands of testator vested in the children upon testator's death, subject to the power in the executor to partition them, and subject to being divested by a sale under the power. There was no equitable conversion worked of the realty into personalty, for the power of sale was not absolute. If the real estate was converted into money by a sale, under the power, the proceeds would still partake of the nature of realty. So much of the estate as was personalty remained in the executor's possession, to be held and managed by him, until the period arrived when he should exercise the power of partitioning and dividing the whole estate. The interest in the realty, which vested in the testator's children upon his death, was liable to be divested, under the provisions of the will, by death before partition completed; as the ownership in the personalty was contingent upon the child's surviving that event. Though the testator contemplates the gift of the shares to take effect in his immediate children, he provided for the contingency of death before the period of partition, by a limitation over to their issue in such event. The provision we have last above quoted from the will, restricting the limitation over to such of the issue of a deceased child as "*shall be living at the time of such partition,*" introduces the difficulty in the case, because it is claimed that its effect might be to prevent the absolute vesting of the share in the issue of a deceased child at the time of the parent's death.

We do not think that the main testamentary purpose of the testator should be allowed to be frustrated because of its existence. The will, in that respect, was carelessly or inartistically drawn. The testator had previously directed the partition and apportionment of his estate among all his children "living at the time of making such partition and division, and the child or children of such of my children as may then

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be dead, leaving issue." Under such a provision, upon the death of a child of testator before partition, leaving issue, the share would have vested absolutely in that issue; the time of payment, merely, being postponed, or, failing issue, it would have gone to the brothers and sisters. The subsequent clause, to which we have referred as creating the difficulty in the validity of the residuary disposition, was an inconsistent provision and one quite unnecessary, so far as relating to the perfection of a testamentary scheme for disposing of the residuary estate. We do not think it should be allowed to prevail over the preceding direction in the same clause, when, by cutting it off and disregarding it, as a void direction interpolated in the instrument, the will of the testator can be effectuated according to a plain and just intent. In doing so, we would thwart no purpose of the deceased, nor make any new testamentary disposition for him. We simply reinstate the purpose, in its integrity, which had just been definitely stated. Under the statute every future estate, which may not vest within the period of two lives in being at the time of its creation, is void, as is any limitation or condition, by which the absolute ownership of personal property may be suspended beyond the specified period of time. When such a void disposition of property has been made by the testator in his will, if it is separable from his principal dispositions, it may be cut off.

In *Harrison v. Harrison* (36 N. Y. 543), it was said that "the principle is now well settled that the courts lean in favor of the preservation of all such valid parts of a will as can be separated from those that are invalid, without defeating the general intent of the testator" (citing many authorities.) In *Tiers v. Tiers* (98 N. Y. 568), it was said: "It is quite evident that the ulterior, contingent limitation is quite separable from the primary trust, and merely incidental; its only purpose being to provide for a contingency which may never arise, and the failure of that provision would not affect the general scheme of testatrix. In such cases the rule is quite well settled that an ulterior limitation, though invalid,

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will not be allowed to invalidate the primary disposition of the will, but will be cut off in the case of a trust, which is not an entirety, as well as in the case of a limitation of a legal estate."

Courts should endeavor, by every reasonable intendment and by a liberal construction, to sustain a testamentary disposition of property when, in so doing, they can give actual and just effect to the testator's purpose and validate at least the main, if not the true part of a testamentary scheme, which contemplates distinct and severable acts. If the principal disposition can be upheld, we should disregard ulterior, contingent limitations, which threaten violation of statutory rules respecting the ownership of property. Thus, in this will, it is perfectly clear that what the testator desired to accomplish was an equal partition of his estate, within a certain period of time, through the exercise of his executor's judgment, among his children then living, and the issue of any child dying before the actual division and apportionment, *per stirpes* and not *per capita*. So much he has said in the opening paragraph of the sixth or residuary clause; and, if it is argued that the subsequent limitation imposed upon the gift, by which, upon the decease of one of his children, the parent's share shall not vest in his or her issue at once, but shall be held and paid over only to those living at the time of partition, is to be taken as a serious purpose of the testator, and constitutes a void ulterior, contingent limitation, it may be severed from the will without affecting the main purpose of the testator. Thus cut off, the attainment of his principal objects would be secured, and the absolute ownership of the personalty and the ultimate vesting in interest of the remainder created in the realty, could not be postponed beyond the life of the parent, testator's child.

For the reasons we have given, the order of the General Term should be reversed, and the judgment of the Special Term should be affirmed, with costs to all parties who have appeared in the action, to be paid out of the estate.

Statement of case.

The respondent moved for a dismissal of the appeal, on the ground that the order of the General Term, which reversed the judgment at Special Term and granted a new trial, is not appealable. Judgment would have been more appropriately ordered under the decision of the General Term, in a case on the equity side of the court involving the construction of a will. But jurisdiction was given to this court to entertain the appeal from the order, by the assent given by appellant in the notice of appeal that judgment absolute should be rendered against him if the order was affirmed. The awarding of judgment absolute can work no prejudice in this case. It fixes and determines the rights and interests of all the parties, and is the authority and guide for the executor in the performance of his duties under the will.

The motion should be denied.

All concur.

Order reversed and judgment affirmed.

Motion denied.

MARY D. CLARK, Respondent, v. WILLIAM R. POST et al., as
Executors, etc., Appellants.

Where, upon sale of real estate by an assignee in bankruptcy, the notice and conditions of sale were attached together and signed by the parties, *held*, that they constituted a memorandum by which both were bound; and that prior negotiations and oral agreements were merged therein; also, that there was an implied warranty that the vendor had a good title, but that this warranty existed only so long as the contract remained executory, and as the terms of sale required a conveyance without warranty or personal covenant, but simply sufficient to pass whatever right the vendor had in the lands upon delivery of the deed, the covenant implied in the contract was discharged, and the grantor thereafter was only bound by whatever covenants there were in the deed.

The deed given by the assignee contained a recital of the various proceedings in bankruptcy which led to the appointment of the assignee; of the commencement of a suit by him as such assignee against S., wife of the bankrupt, who held the legal title of the real estate in question, to have such title adjudged invalid, and a conveyance of the premises to him in consideration of the discontinuance of such suit, "and other good and

118	17
163	293
118	17
169	296

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valid considerations." *Held*, that this did not make a warranty, either express or by way of covenant, that the recitals were true, or permit a recovery as for a breach on proof that the narration was false, as it was not material to the contract contained in the deed or an inducement to it. *Peck v. Hensley* (20 Texas, 673) distinguished.

In an action brought by the purchaser against the executors of the assignee to recover back the purchase-money paid, the complaint alleged that at the time of the sale, before offering the premises, the assignee "stated that he had a good title to it," and could and would give a good title as against S.; that plaintiff bid off and paid for the property and accepted a deed thereof, relying upon that statement, and in consideration thereof, and upon the express understanding and condition that the assignee "would indemnify and protect her against any interest in or title to said premises which might thereafter be legally established and enforced" by S.; that S. subsequently brought an action of ejectment against plaintiff and the assignee, and, under judgment therein in her favor, recovered possession. There was no averment that the assignee acted fraudulently or with intent to deceive. On the trial plaintiff asked a witness as to the statements made by the assignee at the time of the sale; this was objected to on the ground that whatever statements were made, were merged in the written contract. The objection was overruled. *Held*, error.

Plaintiff was also permitted to show that he paid the purchase-price and accepted a deed under an agreement on the part of the assignee that he would hold the money until the claim of S. was decided. This was objected to on the ground that nothing of the kind was alleged in the complaint. No request to amend the complaint was made. The objection was overruled. *Held*, error. Also that, as without this evidence no cause of action was established, a refusal to dismiss the complaint was error.

A party must allege, as well as prove, the facts constituting his cause of action, and a recovery upon a cause of action, not alleged in the complaint, although proved under objection and exception on the trial, is not sustainable.

Clark v. Post (45 Hun, 265) reversed.

(Argued January 30, 1889; decided March 5, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 2, 1887, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and also affirmed an order denying a motion for a new trial; also appeal from an order of said General Term, made September 19, 1887, which affirmed an order of Special Term awarding costs to plaintiff.

Statement of case.

The action was brought against the executors of James R. Hunting to recover back money alleged to have been paid to him upon a consideration which had failed.

The material facts are stated in the opinion.

Hamilton Wallis for appellants. In the absence of fraud the rights of the parties are to be measured solely by the writing. (*Johnson v. Oppenheim*, 55 N. Y. 295; *Mumford v. McPherson*, 1 Johns. 473; *Tallman v. Greene*, 3 Sandf. 441; *Thorp v. K. C. Co.*, 48 N. Y. 256; *Greene v. Collins*, 86 id. 254; *Eighmie v. Taylor*, 98 id. 298; *Corse v. Peck*, 102 id. 513; *Howes v. Baker*, 3 Johns. 510; *Houghtaling v. Lewis*, 10 id. 299; *Burwell v. Jackson*, 9 N. Y. 541; *Wilson v. Deane*, 74 id. 534; 2 Sharswood Black. 300, § 6; *Remington v. Palmer*, 62 N. Y. 31.) Proofs in a cause must follow the allegations contained in the pleadings. (*Rome Ex. Bk. v. Eames*, 1 Keyes, 592.) The complaint is required to state plainly and concisely the facts constituting a cause of action. The pleader may not aver a legal conclusion as an equivalent for the group of separate facts from which it is an inference. (*Schenck v. Naylor*, 2 Duer, 678; *Cooke v. Warren*, 88 N. Y. 40; *Austin v. Searing*, 4 id. 122; *Brown v. Colie*, 1 E. D. Smith, 265; *Adams v. Mayor, etc.*, 4 Duer, 306; *Sheridan v. Jackson*, 72 N. Y. 170; *Storrs v. Flint*, 46 N. Y. Super. Ct. 519.) The recitals contained in the deed from Hunting to Clark cannot support the judgment in this action. (*Wadsworth v. Payne*, 74 N. Y. 196.)

Jesse Johnson for respondent. A statement of a relevant fact in a written agreement is a contract that the fact exists. (*Hawkins v. Pemberton*, 51 N. Y. 198; *Ledwich v. McKim*, 53 id. 307.) Plaintiff had a right under the contract of sale to insist upon a marketable title free from all reasonable doubt, but was induced by the defendant's promise to accept a doubtful title. (*Fleming v. Burnham*, 100 N. Y. 1; *Jordan v. Poillon*, 77 id. 521.) The promise being by parol, its precise meaning and effect were rightly left to the jury.

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(*Power v. Barham*, 4 A. & E. 473; *Hawkins v. Pemberton*, 51 N. Y. 205, 206, 207; *Duffee v. Mason*, 8 Cow. 25.) The promise made by Hunting was not merged in the deed, but constituted an independent collateral contract, the breach of which is a valid cause of action and sustains the verdict. (*Remington v. Palmer*, 62 N. Y. 31, 33; *Murdock v. Gilchrist*, 52 id. 242; *Thayer v. Vilas*, 23 Vt. 494; 30 id. 482; *Buzzill v. Willard*, 44 id. 44; *Merrill v. Ramsey*, 34 id. 80.) A deed, given pursuant to a written contract does not supersede the written contract, but an action can be maintained on the covenant in the written contract. (*Bogart v. Burkhalter*, 1 Den. 125; *Chapin v. Dobson*, 78 N. Y. 74; *Grierson v. Mason*, 60 id. 394; *Smith v. Holbrook*, 82 id. 562; *Lindley v. Lacey*, 17 C. B. 578; *Erskine v. Adrian*, 8 Ch. App. 756; *Carr v. Dooley*, 119 Mass. 294; *People v. Baldwin*, 6 Cush. 550; *Brackett v. Evans*, 1 id. 79; *Unger v. Jacobs*, 7 Hun, 220.) Hunting's agreement to protect Mrs. Clark against Mrs. Buck's claim was executed and is not within the statute of frauds. (*Remington v. Palmer*, 62 N. Y. 34; *Carr v. Dooley*, 119 Mass. 294, 297; *Brackett v. Evans*, 1 Cush. 79; *Gilman v. McArdle*, 99 N. Y. 451.) Were the money paid by plaintiff to Hunting still in Hunting's possession, undistributed (apart from any warranty either in writing or by parol), the plaintiff could recover it *ex aequo et bono*. (*White v. Cont. Bk.*, 64 N. Y. 316; *Fitzpatrick v. Woodruff*, 96 id. 561; *Preston v. Fryer*, 3 Md. 221; *Hemsler v. Neckum*, 3 id. 270; *Hussey v. Toquemore*, 27 Ala. 238.) In oral contracts it is with the jury not only to ascertain what was said, but also to ascertain what was meant or intended, and what is the proper construction or interpretation of the words used. (*Bank v. Dana*, 79 N. Y. 108, 116; *Duffy v. Mason*, 8 Cow. 25; *Hawkins v. Pemberton*, 51 N. Y. 202.) Plaintiff was entitled to recover costs and disbursements. (2 R. S. [Edm. ed.] 92, § 41; *Horton v. Brown*, 29 Hun, 654; *Snyder v. Snyder*, 26 id. 324; *Rooney v. Lenmon*, 3 L. B. 101; *Field v. Field*, 77 N. Y. 294; *Wilkinson v. Littlewood*, 67 How. Pr. 474; *Bullock v. Bogardus*, 1 Den. 276; *Johnson v. Myers*, 103

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N. Y. 666; *Daggett v. Mead*, 11 Abb. N. C. 116; *Cruikshank v. Cruikshank*, 9 How. Pr. 350; *Harrison v. Ayres*, 18 Hun, 336; *Buckhout v. Hunt*, 16 How. Pr. 407; *Fort v. Gooding*, 9 Barb. 388; *Hyland v. Carpenter*, 20 W'kly Dig. 261; *Chesebro v. Hicks*, 66 How. Pr. 194; *Niblo v. Binsee*, 31 id. 476.) A recital in a written contract will be construed as a covenant or agreement that the recital is true even *when the contract related to real estate*. (*Peck v. Hensley*, 20 Tex. 673; *Douglass v. Hennessy*, 3 N. E. Rep. 525; 15 R. I. 272; *Green v. Collins*, 86 N. Y. 250, 251; *Sparrow v. Kingman*, 1 id. 246; 1 Parsons on Contracts [7th ed.] 624; *Henshaw v. Robins*, 9 Met. 83; *Hastings v. Lovering*, 2 Pick. 214; *Borrekins v. Bevan*, 3 Rawle, 23; *Cramer v. Bradshaw*, 10 John. 484; *Hawkins v. Pemberton*, 51 N. Y. 198.)

DANFORTH, J. It appears that William Buck and William Buck, Jr., became bankrupts, and on the 3d of July, 1877, Huntting was appointed their assignee. At that time, Sibyl T. Buck, wife of William, had the title to certain real estate in Sag Harbor, and, to facilitate a compromise then under consideration, conveyed it to Huntting, as assignee, by deed absolute in form, but upon parol condition that it should be void and of no effect if the proposed compromise fell through. It did fail. Afterwards (February 13, 1878), Huntting, as assignee, offered the real estate for sale at auction, upon certain terms, and among others (1st), that twenty-five per cent of the purchase-money should be paid down, and for which a "receipt would be given;" (2d), the residue to be paid July twenty-third, at the office of Carpenter, his attorney, when the deed "will be ready for delivery." Other conditions usual in such sales, but not now important, were imposed. The plaintiff, by her agent, bid for and became the purchaser of the premises at the price of \$3,500, and signed the conditions of sale. Before offering the property, however, but at the time of the sale, the assignee stated that he had a good title to it, and could and would give a good title to the purchaser thereof, as against the bankrupts, and as

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against Sibyl T. Buck. These facts are alleged in the complaint, and it is also stated that the plaintiff bid off and purchased the property and paid for it, and accepted a deed therefor, relying on that statement and in consideration thereof, and "upon the express understanding and condition that the said Huntting would indemnify and protect her against any interest in or title to said premises which might thereafter be legally established and enforced by the said Sibyl T. Buck, and not otherwise."

On the 21st of February, 1880, Sibyl brought an action against Huntting and this plaintiff and others to recover the premises, on the ground that the condition on which she had given the deed had happened, and so the consideration had wholly failed. During its pendency Huntting died, and his executors were substituted in his place as defendants. The suit was decided in favor of Sibyl, and it was adjudged that her title was good and that she was entitled to a reconveyance. The plaintiff (purchaser of the property) was therefore compelled to surrender possession to her. There was no suggestion or pretense that the testator acted fraudulently or with intent to deceive.

The defendants put in issue the making of the representations alleged in the complaint, but did not deny the other material allegations to which I have referred. Upon the trial the plaintiff was not called as a witness, but her husband, who acted as her agent in making the purchase, was called in her behalf and testified that at the sale he asked "What kind of a title the assignee proposed to give on that property?" At that point defendants' counsel interrupted and said, "I object on the ground that, whatever his statements, they were merged in the written contract." The objection was overruled and an exception taken, and the witness continued: "He said they would give a title that would hold against William Buck, Mrs. Buck, William Buck, Jr., or any other Buck. Those were his words." After the sale a deed was prepared and delivered unsigned to the witness as agent for his wife, and he, having heard that a sale of other property by the assignee

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was to be resisted by Mrs. Buck, examined the deed and objected to it on the ground that it did not contain proper covenants. He "could not see that it contained any warranty." He then saw Huntting; told him he didn't think he would take the deed; didn't feel it safe to do so, and thought he would throw it all up. Huntting said he hoped he wouldn't do that. The witness, after objection, continued: "I told him that I thought I would not take the title; that I had fully decided not to take it. Mr. Huntting said that he hoped I wouldn't refuse to take the deed, for to sell it over again would injure the sale of it very much, and he hoped that I would take it. *Well, I told him then that if he would agree to hold the money that I had paid in the interest of my wife for that property until her 'pretended claim,' as he called it, was decided, that I would take the deed. Mr. Huntting I was very well acquainted with, and supposed it would be all right. He said that he would do so. He said that he would do so to protect me, and also to protect himself, and I told him if he would do that I would take the deed in the interest of my wife.*"

The defendants' counsel asked to have so much of the testimony of this witness as is italicised stricken out, on the ground that there is no allegation of anything of the kind in the complaint. The request was denied and an exception taken. "Afterwards," the witness says, "I paid the balance of the money and took the deed." The defendants gave evidence controverting the statements of plaintiff's witnesses as to representations at the time of the sale. The jury, however, in answer to specific questions put to them by the court, adopted the plaintiff's version, and concerning the conversations stated by witness Clark to have occurred after the sale and before he accepted the deed, found that they did occur. The appellants' contention was that the evidence was insufficient in any view to justify a recovery. He asked for a nonsuit and his request was denied.

First. The notice of sale and the conditions of sale were attached together and signed by the parties. They consti-

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tuted a memorandum of what each was to do, and by it both were bound. In it, as in other contracts for the sale of land, there was an implied warranty by the vendor that he had a good title. This warranty, however, existed only so long as the contract remained executory, and there was no other obligation than to give a conveyance without warranty or personal covenant, but sufficient to pass whatever right the vendor had in the lands to the purchaser. When the deed was given the covenant actually implied into the contract was discharged, and the covenants in the deed, if any, took effect. In like manner the conversation between the parties, and the words which passed between them before the conditions of sale were signed, merged in that paper. These results follow from the general principle that all negotiations between the parties prior to or contemporaneous with the execution of a deed are merged in it. The deed given by the assignee contains no warranty. The learned counsel for the respondent admits that it contains no formal warranty, but he finds in the recital a statement of facts which he says are untrue, and regards them as equivalent to an agreement. It is plain it was not intended by the vendor to be a warranty; nor was it understood by the vendee to be such. The deed was objected to because it was lacking in that respect. But what is more to the purpose than the understanding of the parties, the words used do not make a warranty, either expressly or by way of a covenant, that the grantor was either the owner of the premises or had any special interest therein. The recital exhibits the various proceedings in bankruptcy which led to the appointment of the assignee, his efforts as such to assail by suit the title of Sibyl to the real estate claimed by her; its conveyance to him as assignee in consideration of the discontinuance of the suit, and other good and valid considerations "therein expressed," and describes the place and time of the record of that deed. These facts form links in the official proceedings of the assignee and facilitate inquiry by the purchaser, but they were not material to the contract which the deed contains, nor an inducement to it.

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As the sole object of the deed was to convey such title as the assignee in bankruptcy had acquired, there is no reason to suppose the recitals were intended to be more than a narrative leading up to that title. There is no rule of construction which will enable a court to regard it as equivalent to a covenant that the circumstances narrated were true, or permit an action as for a breach, if the narration should prove to be false. "A recital is the setting down or report of something done before." (Shepard's Touchstone, chap. 5, Exposition of Deeds, 76, § 3.) In *Bath v. Monlaysee* (Cases in Chancery, 3d part, 101), Chief Justice HOLT says: "The reciting part of a deed is not at all a necessary part either in law or equity. It may be made use of to explain a doubt of the intention and meaning of the parties, but it hath no effect or operation."

I have examined the cases referred to by the learned counsel for the respondent, and, so far as they relate to recitals in a deed disposing of real estate, find nothing to alter the construction required by the authorities I have cited, nor do I find anywhere that the recital by itself has been held to amount to a covenant. In one of those referred to by the respondent (*Peck v. Hensley*, 20 Texas, 673), there was a recital of the chain of title, followed by a covenant "to warrant and defend" the grantor's title, etc., and the court held that the intention manifested by the context was to covenant that they had the right to convey the land. There was no covenant in the case before us, nor is there anything to indicate that one was within the intention of the parties. If it should even be conceded that the grantor would be estopped by the recital, it would by no means follow that he would be bound by its averments as a covenant, either express or implied. The opposite doctrine has been justly characterized as a dangerous one (Rawle on Covenants for Title [5th ed.] 280), and as one likely to entrap parties "into covenants which they never thought of and to which they were never asked to yield their assent." (*Whitehill v. Gotwalt*, 3 P. & W. [Penn.] 313-324.) It would be strange, indeed, if such implication should be allowed

where, as in the case at bar, the grantor's covenant was asked for but refused. The recital, in fact, shows the official action of the grantor and has no other object or purpose whatsoever. It does not even amount to a direct affirmation, but were it otherwise, it expresses no covenant, and under the statute of alienation by deed (1 R. S. 738 § 140) none could be implied into the conveyance. Further discussion upon this point is needless, for the action proceeded upon no such ground as that now taken by the plaintiff, nor was it founded upon the deed, but upon matters wholly external to it.

Although requested by the plaintiff to hold, as matter of law, that the recitals entitled the plaintiff to a verdict, the learned trial judge declined to do so, and, notwithstanding the defendants' request for instructions to the jury in regard to them, he declined, saying he expressed no opinion as to whether there was evidence in the case that the recitals were not true. The case, from the beginning to end, from the complaint to the submission of the case to the jury, rested upon oral statements, and a breach of those statements constituted the sole cause of action.

Second. Parties may doubtless enter into covenants collateral to the deed. (*Houghtaling v. Lewis*, 10 Johns. 297; *Erskine v. Adeane*, L. R., 8 Ch. App. 756; *Morgan v. Griffith*, L. R., 6 Exch. 70.) The difficulty is to determine when an agreement occupies that position. The respondent claims that the agreement which the jury found in the case before us was of that character, viz., that "Hunting promised to protect the plaintiff if said deed was accepted, and to hold the purchase-money for the benefit of the parties who should be entitled to it, until the claim of Mrs. Buck against the property was decided, and to refund said purchase-money in case he, the said Hunting, proved to have no title." The learned trial judge allowed the verdict to stand on that ground only. It is not necessary that we should determine its effect in relation to the deed, or whether it was collateral to it and sufficient upon default to sustain an action, for no such agreement was alleged in the pleadings, or properly before the court.

The evidence relied upon to sustain the finding I have set out above. It should, I think, have been stricken out as desired by the defendants' counsel. If it tended to establish a contract, it was one not within the issue, and without that evidence the plaintiff had no shadow even of a case. The objection cannot, with proper respect to the rights of the parties, be disregarded. One party to the supposed agreement, the defendants' testator, is dead. His estate is put in peril by the survivor, upon the testimony of her husband, who was in all these matters her agent, and who, by the death of his interlocutor, is made safe from contradiction. The propriety of holding the living party to the observance of strict rules of practice is made apparent by the papers which form part of the record. After the death of Hunting, on presenting her claim to his executors, the plaintiff described it under oath as for the "sum of thirty-five hundred dollars had and received of Mary D. Clark, and paid by her to him, July 31, 1878, for a house and lot situated in Sag Harbor, which the said Hunting claimed and represented to her he had the power and right to sell and convey to her as assignee in bankruptcy of William Buck and William Buck, Jr., and which she paid said Hunting, relying on the truth of his said representation, when said Hunting had no authority to sell said land, and knew all the facts as to his want of authority, and she had no knowledge of them." The difference between the two claims is too well defined not to be observable, and it would be unfair to bind the defendants by a case which, however proved, was neither called to their attention before the surrogate, nor by the complaint which followed their refusal to refer the claim actually presented. A party must recover not only by his proof, but upon his allegations. The facts stated must constitute a cause of action and they must be in evidence. It is not enough that they stand upon proof, unless that proof is preceded by statement. The motion to strike out the evidence because not within the issue, was distinctly presented, and no application to amend, or for other relief, was made by the

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plaintiff. Not only was there error in refusing to grant that motion, but the request of the defendants that the complaint be dismissed, should have been granted, for, without that evidence the plaintiff's case, however viewed, had no foundation.

The judgment should, therefore, be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

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JOHN PARKER et al., as Executors, etc., Appellants, v. MARIA LINDEN, Respondent and MARTHA LYTHGOE et al., Appellants.

L. died leaving a widow and no children. His will, after a devise of his residuary real estate to three persons named, his next of kin and heirs, who were non-resident aliens, contained a direction that said real estate be sold at auction by a referee appointed by the Supreme Court, the net proceeds to be deposited in court "in the same manner as money belonging to non-residents" for the use and benefit of the devisees "subject to the further order of the court." In an action for a construction of the will, it appeared that two of the devisees died before the testator; the court found that the gifts to them lapsed, and as to their portions the testator died intestate. The court also found that the direction for a sale worked an equitable conversion of the real estate into personalty and the portion so undisposed of was to be distributed as such; that is, to the widow one-half and \$2,000 in addition. *Held*, error; that the direction for a conversion was simply for the purposes of the will, and while as to the non-resident aliens the doctrine of conversion would, if necessary, apply in their favor, if not required for that purpose, a conversion would not be presumed; and, so far as the widow was concerned, the property undisposed of, whether a sale was necessary or not, devolved according to its original character.

One of the parties appellant also appealed separately from the same judgment. *Held*, that the appeal should be dismissed as unnecessary.

Reported below, 44 Hun, 518.

(Argued February 1, 1889; decided March 5, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order

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made May 16, 1887, which affirmed a judgment, entered upon a decision of the court on trial at Special Term.

The action was brought by the executors of James Linden, who died June 20, 1885, leaving no issue, to obtain a judicial construction of his will, a sale of the real estate of which he died seized, a declaration that the share of William Lego lapsed, and for other incidental relief. The will which was executed November 9, 1879, so far as is material to any question presented by either party, is substantially as follows:

First. The testator gives to Maria Linden \$1.

Second. Makes provision for the improvement of his burial place.

Third. Declares some small bequests.

The *fourth* clause is in these words: "I give and bequeath to my half-brothers, William Lego and Mark Lego, and my half-sister, Jane Lego, now or late of Liverpool England, all the rest, residue and remainder of my estate, both real and personal, of what nature or kind soever, to be received by them, share and share alike or in equal parts.

"*Fifth.* I order and direct my executors, as soon after my demise as possible, to take possession of my personal estate of whatever name or kind, and not hereinbefore granted or bequeathed, and to sell the same at public vendue, and to take possession of my real estate, and collect the rents thereof, and the surplus money, arising from such rents after paying expenses, and the money arising from the sale of my personal estate, to be deposited by my executors in the Greenwich Bank for Savings, at present located at No. 73 Sixth avenue in the city of New York, to remain in said bank until there shall be money sufficient with any money I may have in said bank, together with any money I may have in any other bank or at any other place, to pay all bequeaths herein given and work ordered to be done, then all the money given or bequeathed to be paid as hereinbefore directed.

"*Sixth.* I order, after all my just debts and bequeaths are fully paid and discharged, that my real estate be sold at public auction, under the direction of a referee appointed by the order

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of the Supreme Court; that said referee execute to the purchaser or purchasers a deed of the premises sold; the proceeds of the sale, after deducting his fees and expenses of sale, said referee shall deposit in the Supreme Court to be invested under the direction of said court, in the same manner as money belonging to non-residents according to the rules and practice of the Supreme Court in such cases, for the use and benefit of William, Mark and Jane Lego as before directed, subject to the further order of the court.

"The property situate on the south-easterly corner of Eighth avenue and Thirty-fifth street, I direct not to be sold during the time the dower right of Mary Ann Graham is a lien on said property."

The widow and children answered. Upon trial at Special Term it was found:

VII. That the testator's half brother, William Lego, otherwise known as William Lythgoe, one of the legatees named in the will, died in September, 1880, leaving him surviving his four children, Charles, Martha and Francis Lythgoe, and Mary Ellen Kendrick, defendants in this action.

VIII. That the testator's half sister, Jane Lego, otherwise known as Jane Smith, went to Australia about 1837, purposing to make her home there, and that she afterwards went to New Zealand, but that her relatives have not heard from her for upwards of forty years, and that reasonable inquiry has been made at her last known address to ascertain if she be still living.

IX. That all of the testator's heirs and next of kin are non-resident aliens.

X. That dower out of the real property of the testator has been assigned to his widow, the defendant Maria Linden.

XI. That the testator gave to this court a power to appoint a referee to sell his real estate and to pay over the proceeds according to the direction of this court.

And as conclusions of law:

III. That a legal presumption arises that Jane Lego, *alias* Jane Smith, testator's half sister, died before the testator.

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IV. That by reason of the death of William Lego, *alias* William Lythgoe, and of Jane Lego, *alias* Jane Smith, before that of the testator, the legacies to them lapsed, and as to their portions the testator died intestate.

V. That the testator's direction that all of his real estate be sold and converted into money produces an equitable conversion of his real estate into personalty, and that it must be distributed as personal property.

VI. That the dower interest of the widow, Maria Linden, forms no part of the estate to be distributed under the will.

VII. That besides said dower interest the widow, Maria Linden, is entitled to one-half of the remainder after the payment of Mark Lego's (Mark Lythgoe's) share and to \$2,000 besides.

VIII. That the testator gave no power of sale to the executors, but did give to this court a power to appoint a referee to sell the real estate.

IX. That the share or portion of the estate to which Jane Lego's, *alias* Jane Smith's, children would be entitled if she left any her surviving, should be paid into court to await further inquiry as to whether or not she died leaving issue.

The trial judge appointed a referee to sell the real estate, and directed that the proceeds be brought into court to await its further order.

From the judgment entered upon these findings an appeal was taken to the General Term by Mark Lythgoe, Martha Lythgoe and Mary E. Kendrick, and by the plaintiffs, so far as material here, from so much of it as adjudges a conversion of the real estate of the testator into personal, so far as the interests of Maria Linden were involved, and that Maria Linden is entitled to a share in the proceeds of the sale of the real estate of which said James Linden died seized. From the judgment of affirmance the same parties Lythgoe appealed to this court, and the plaintiffs appealed from so much of it "as affirmed that part of the judgment of the Special Term that awarded to Maria Linden, in addition to her dower and her distributive share of the personal estate left by James

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Linden, one-half or a portion of the proceeds of real estate directed to be sold under the will of James Linden, deceased."

Henry Brewster for executors, appellants. *B. Vanderhoeven* for Charles Lythgoe et al., appellants. The intention of the testator, which is to be derived from the language employed in the will itself, which is to be interpreted in the light of surrounding circumstances, is the controlling element in the construction of wills. (*Byrnes v. Stillwell*, 103 N. Y. 458; *Keteltas v. Keteltas*, 72 id. 314; *Allen v. De Witt*, 3 id. 282; *Tillman v. Davis*, 95 id. 30; *Bogert v. Hertell*, 4 Hill, 497; *Wood v. Mitchem*, 92 N. Y. 175; *Ozley v. Lane*, 35 id. 340, 347; 2 Story's Eq. Juris. [13th ed.] 114, § 792; 1 Fonblanque on Eq., chap. 6, § 9, and notes; *Craig v. Leslie*, 3 Wheat. 577, 578.) The testator, by the "sixth" clause of his will, equitably converted his real estate into personal property for such uses and purposes as were expressed or implied by his will. (3 Redf. on Wills, 140, note 13; *Bogert v. Hertell*, 4 Hill, 495, 496, 497, 498, 499, 501; *Hatch v. Bassett*, 52 N. Y. 361; *Morse v. Morse*, 85 id. 59; *Gott v. Cook*, 7 Paige, 534; *Power v. Cassidy*, 79 N. Y. 615; *Bramhall v. Ferris*, 14 id. 42, 46; *Delafield v. Barlow*, 107 id. 540; Leigh & Dal. on Eq. Con. 91, 93, 113, 114, 117, 120; *Gourley v. Campbell*, 66 N. Y. 174; *Fisher v. Banta*, Id. 476; *Hawley v. James*, 5 Paige, 318, 444; *S. C.*, 7 id. 219; *Betts v. Betts*, 4 Abb. N. C. 419; *Purdy v. Hoyt*, 92 N. Y. 446.) There is an absolute "out and out" conversion by will when a testator directs that his estate be converted from one species of property into another for *all purposes* whatsoever. (3 Redf. on Wills, 140, §§ 7, 8; *Gourley v. Campbell*, 66 N. Y. 173; *Hatch v. Bassett*, 52 id. 173; *White v. Howard*, 46 id. 162; *Kane v. Gott*, 24 Wend. 641; *Delaney v. McCormack*, 88 N. Y. 175.) There can be no partial failure of a provision for an absolute "out and out" conversion, as in such conversions the property is converted for all purposes and under all circumstances. (*White v. Howard*, 46 N. Y. 162; *Moncrief v. Howard*, Id. 436; *Betts v. Betts*, 4 Abb. N. C. 386, 387,

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420; *Gallup v. Wright*, 61 How. Pr. 281; 1 Jarman on Wills [Bigelow's 3d Eng. ed.] chap. 19, pp. 586, 590, 591.) The fact that it is necessary that the real estate should be sold to enable one of the residuary legatees to take his share as personalty does not make the sixth clause of the will an out and out conversion. (Leigh & Dal. on Eq. Con. 117-120; *Bogert v. Hertell*, 4 Hill, 496, 498, 499, 501; *Downing v. Marshall*, 1 Abb. Ct. App. Dec. 503; 1 Williams on Executors, 417.) The appellants, Charles Lythgoe, Martha Lythgoe and Mary Ellen Kenrick, are entitled, as heirs of the testator James Linden, to share in so much of the real estate or the produce thereof as is undisposed of by the will of James Linden, deceased. (*Bogert v. Hertell*, 4 Hill, 495, 496, 498, 499, 501; *Purdy v. Hayt*, 92 N. Y. 446; *Chamberlain v. Chamberlain*, 43 id. 429; *Girard v. Girard*, 58 How. Pr. 182; Leigh & Dal. on Eq. Con. 115, 118.) The undisposed of produce of the real estate of James Linden, deceased is no part of his general personal estate. (Leigh & Dal. on Eq. Con. 91-93; Code of Civil Pro. § 2514, subd. 13; *Bogert v. Hertell*, 4 Hill, 495, 496, 501, 512; *Betts v. Betts*, 4 Abb. N. C. 419; 2 Brown's Ch. Cas. [Eng.] 595; *Johnson v. Bennett*, 39 Barb. 237; 1 Jarman on Wills, chaps. 19, 586, 590, 591; *Chamberlain v. Taylor*, 105 N. Y. 193.) Mark Lego could have elected to take his share as real estate and thus have prevented a sale. (*Prentice v. Janssen*, 79 N. Y. 478; *Hetzel v. Barber*, 69 id. 11.) The real property of James Linden was not equitably converted at the time of his death. (*Moncrief v. Ross*, 50 N. Y. 436; *Vincent v. Newhouse*, 83 id. 511, 512; *Tillman v. Davis*, 95 id. 24; *Shipman v. Rollins*, 98 id. 326; *Delaney v. McCormack*, 88 id. 183; Leigh & Dal. on Eq. Con. 54; *Hancox v. Meeker*, 95 N. Y. 528, 535.) Non-resident aliens can take real property by descent or devise. (N. Y. Stat. of 1875, chap. 38; *Stamm v. Bostwick*, 40 Hun, 35, 38.) If the widow was entitled by the will to the property which she claims under the statute, she would be put to an election between dower and the provision made for her by

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the will. (*In re Frazer*, 92 N. Y. 249, 250; *Konvalinka v. Schlegel*, 104 id. 129, 130; *Vernon v. Vernon*, 53 id. 351, 362; *Purdy v. Hayt*, 92 id. 446.)

L. A. Gould & A. J. Skinner, for Mark Lythgoe, appellant. The facts alleged in the complaint are not sufficient to show jurisdiction to maintain an action for the construction of the will. (*Horton v. Cantwell*, 108 N. Y. 265, 266; *Weed v. Weed*, 94 id. 243.) The lapsed legacies of \$500 to Mary Jane Frazer, and the gold watch to James Linden, Jr., fall into the residuary estate. And Mark Lythgoe, as residuary legatee, is, by the terms of testator's will, entitled to one-third of the said lapsed legacies. (2 Rop. on Leg., 453; *Brown v. Higgs*, 4 Barb. 768; *Banks v. Phelan*, 4 Barb. 90, 91; *Roberts v. Cooke*, 16 Ves. 451; *King Woodhull*, 3 Edw. Ch. 79, 82; *Davers v. Deves*, 3 P. Wms. 40; *Attorney-General v. Johnston*, Amb. 577; *Shanly v. Baker*, 4 Ves. 732; *Roberts v. Cooke*, 16 id. 451.) *King v. Strong*, 9 Paige, 94; 79 N. Y. 360; *In re Benson*, 96 id. 510.) The portions of the residuum that lapse, namely, the bequests to William and Jane Lego, so far as they consist of real estate, or the proceeds of real estate, remain real estate, and descend to the heirs of the testator. (2 Redf. on Wills, 125, par. 5; 2 Story's Eq. Jur. § 1214; Leigh & Dalzel on Eq. Con. 2, 93, 101, 115, 116; Bispham's Prin. of Eq. 368; *Fletcher v. Ashburner*, 1 Bro. C. C. 435, 497, note 1; *Ackroyd v. Smithson*, Id. 502, 503, 515; *Johnson v. Woods*, 2 Beav. 409, 413; *Hopkinson v. Ellis*, 10 id. 160, 175; *Shallcross v. Wright*, 12 id. 505, 508; *Smith v. Claxton*, 4 Madd. 484; *Wright v. M. E. Church*, 1 Hoff. 202; *Hawley v. James*, 7 Paige, 213; *Wood v. Cone*, Id. 471; *Bogart v. Hertell*, 4 Hill, 496; *Betts v. Betts*, 4 Abb. N. C. 317, 419, 420; *Chamberlain v. Taylor*, 105 N. Y. 194, 195.) The heirs of James Linden may take the proceeds of real estate as money. (2 Story's Eq. Jur. 1213; *Johnson v. Woods*, 2 Beav. 412, 414.) The heirs may elect to take the land and prevent the conversion into money, the rights of others not being affected thereby. (*Hetzell v. Barber*, 69 N. Y. 1, 11; *Prentice v. Janssen*,

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79 id. 485; *Armstrong v. McKelvey*, 104 id. 183.) That the heirs are aliens does not prevent their taking and holding real estate; the females absolutely, and the males as against every one except the State. (2 R. S. [6th ed.] 1097, 1098, §§ 43, 44; *Luhre v. Eimer*, 80 N. Y. 171, 177, 178; *Hall v. Hall*, 81 id. 131, 137; *Storms v. Bostwick*, 40 Hun, 35; *Goodrich v. Russell*, 42 N. Y. 177. The respondent herein having had her dower is estopped in equity to claim under the statute of distributions, as personal property, what has already been deemed real estate for the purpose of admeasuring her dower, so long as there are heirs to take the land. (4 Kent, 35, and note *a*; Stuart's View of Society, 29, 30, 223-227; Story's Eq. Jur. § 629; 5 Stat. S. C. 163; *Evans v. Pierson*, 9 Rich. L. [S. C.] 9; *Avant v. Robinson*, 2 McMullan [S. C.] 215; 2 R. S. [6th ed.] 1121, § 3; 4 Kent, 58.) The doctrine of absolute equitable conversion, when applied, reaches the dower right of the widow, which is a mere chattel interest or chose in action. (Cameron on Dower, 321-324; *Coster v. Clarke*, 3 Edw. Ch. 438; 4 Kent Com. 50.) The fact that respondent has had her dower admeasured and assigned to her from the realty itself is a solemn admission on her part that there has been no conversion of the realty as to her. (*Chamberlain v. Chamberlain*, 43 N. Y. 445; *Vincent v. Newhouse* 83 id. 505; *Chamberlain v. Taylor*, 105 id. 194, 195; *Wilder v. Ranney*, 95 id. 7, 12.)

Edward S. Peck for respondent. There was an out and out conversion by the will of the testator's real estate into personalty. (2 Redf. on Wills, 140, §§ 7, 8, 13; Leigh & Dal. on Eq. Conversion, 128, 133; *Kane v. Gott*, 24 Wend. 659; *Johnson v. Bennett*, 39 Barb. 237-251; *Stagg v. Jackson*, 1 N. Y. 206, 212; *Hatch v. Bassett*, 52 id. 359, 361; *Moncrief v. Ross*, 50 id. 431, 436; *Lent v. Howard*, 89 id. 169-177.) The conversion being "out and out" the widow will be entitled to her distributive share of the lapsed legacies. (*Edsall v. Waterbury*, 2 Redf. 48; *Sink v. Sink*, 53 How. Pr. 400; *Lefevre v. Lefevre*, 59 N. Y. 434, 447; Redf. on Sur.

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Pr. [2d ed.] 595; *Hatch v. Bassett*, 52 N. Y. 362; *Kerr v. Dougherty*, 79 id. 327, 349.) All the testator's estate after deducting the dower having been converted into personal property all lapsed legacies will be subject to distribution under the statute. (Redf. on Sur. Pr. [2d ed.] 574; id. [3d ed.] 589; Willard's Eq. [Potter's ed.] 512; 1 Roper on Legacies, 484, 485; *Vernon v. Vernon*, 53 N. Y. 351, 362; *Edsall v. Waterbury*, 2 Redf. 48; *Sink v. Sink*, 53 How. Pr. 400; Leigh & Dal. on Eq. Conversion, 128-133; Meggison on Assets in Eq. 205; *Kearney v. Missionary Society*, 10 Abb. N. C. 278, 279; *Meakings v. Cromwell*, 5 N. Y. 136, 143; 3 R. S. [6th ed.] 58, § 6; 2 id. 1096; Gerard on Titles to Real Estate, 92; *In re Hodges*, N. Y. L. J., April 14, 1888.) Inasmuch as all the legacies lapse, except that to Mark Lego, after the payment of his share, the widow will take that share given to her by the statute of distributions, which gives her one-half of the remainder and \$2,000 besides. (3 R. S. [6th ed.] 104, § 90, sub. 3; Redf. on Sur. Pr. [2d ed.] 594; *Doughty v. Stillwell*, 1 Bradf. 300.) The will directs a positive and unconditional conversion of the real estate into personal property, and the conversion is held to take place at the time of the testator's death. The testator's whole estate would, therefore, be considered as personal from the time of his death. (*Chamberlain v. Chamberlain*, 43 N. Y. 432; *Lent v. Howard*, 89 id. 169; *Horton v. McCoy*, 47 id. 25, 26.) As the testator directed all his property to be converted into money his widow will be entitled, first, to her dower, which was her's absolutely, and could not be taken away by the testator, and which really formed no part of his estate. (*Konvalinka v. Schlegel*, 104 N. Y. 125; *Wood v. Wood*, 5 Paige, 601; *In re Frazer*, 92 N. Y. 250; *Havens v. Havens*, 1 Sandf. Ch. 331; *Adsit v. Adsit*, 2 Johns. Ch. 448; *Church v. Buell*, 2 Denio, 430; *Lewis v. Smith*, 9 N. Y. 502; *Sandford v. Jackson*, 10 Paige Ch. 266; *Fuller v. Yates*, 8 id. 325.) The direction to sell was a valid trust or a valid power in trust. (2 R. S. [6th ed.] 1109, § 69; id. 1116, § 122; *Manice v. Manice*, 43 N. Y. 364; *Meakings v. Cromwell*,

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5 N. Y. 136, 143; *Van Beuren v. Dash*, 30 id. 393, 414.) To render a subsequent provision in a will repugnant to a previous one the last provision must be entirely incompatible with the first. The last provision must be such that if effect be given to it the former must entirely fail. (*Sweet v. Chase*, 2 N. Y. 73-79; *Taggart v. Murray*, 53 id. 233, 236.)

DANFORTH, J. The important question is whether the direction for conversion is, by the terms of the will, absolute and imperative, so as to be complete to all intents and purposes, or whether the conversion directed is for the purposes of the will only. If the latter, then if those purposes fail, or do not exhaust the proceeds, the property unapplied, whether the estate has been actually sold or not, will devolve according to its original character. (*Gourley v. Campbell*, 66 N. Y. 169.) Here the controversy is between Maria Linden, the widow respondent, and the residuary legatees, and, according to the construction given, the first gains and the other class loses. Was there a conversion so far as the widow was concerned? The residuary legatees are the next of kin and heirs-at-law of the testator, and he directed the proceeds of the sale of his real estate to be given to them, and as non-resident aliens the doctrine of conversion would, if necessary, apply in their favor. (Lewin on Trusts [7th ed.] 812.) He may be deemed to have known it and framed his will for their benefit. This was the view of the General Term. That court regarded it as clear that "the testator intended that his estate should be converted into personalty in order that his alien brother and sister might take." It was, in fact, unnecessary to accomplish that object; as to all others except the state they could take and hold as heirs or devisees. (Chap. 38, Laws of 1875.) There is however, nothing to indicate that his purpose was to give the widow more than the law entitled her to demand.

It is plain he wished her to get no part of his estate, and, indeed, cut her off with \$1, and directed his executors to devote, if necessary, the rest of his property to resisting any attempt

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she might make to get more. Of course, if his language requires an out and out conversion, this exclusion of the widow is of no moment, but it is of some aid in getting at his intent. We are of opinion that as, to the widow, there was no conversion of the realty, and that her rights are not increased by the provisions of the will in that respect. She is entitled to her dower in the real estate of which the testator died seized, and if he died intestate as to any portion of his personal estate, she is entitled to a distributive share of that portion. (*Lefevre v. Lefevre*, 59 N. Y. 434.) She neither gains nor loses through the provisions of the will. Her rights are independent of them. The testator devised his real estate to his half brother and half sister. The will contains no words from which an intimation can be gathered that he intended to impress a new character on that estate, or that either the power of sale or its exercise should change the direction of this bounty, or alter the essential nature of the property so characterized. No wish of the testator is expressed which requires a sale except for some purpose of the will itself. If not required for that purpose a conversion will not be presumed. (*Chamberlain v. Taylor*, 105 N. Y. 185.) If Linden had left no will, the widow's rights in the real estate would have been limited by her dower interest; and there is nothing in that instrument or the circumstances of the case which can increase her share. If a sale is necessary, the residue of the proceeds of the land will belong to the heirs. If unnecessary for any purpose directed by the will, they are entitled to it in its present form, and a sale against their objection should not be decreed. They have a right to that, and "the notional conversion" will subsist only until the *cestui que trust*, who is competent to elect, intimates his intention to take the property in its original character. (*Seeley v. Jago*, 1 P. Wms. 389.)

The appeal must prevail and the judgment of the General and Special Terms be reversed and new trial granted, with costs to all parties, to be paid out of the fund.

We are furnished with a record showing a separate appeal by Martha Lythgoe from the same judgment, but differing in

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no other respect from the case just considered, and to which, as one of several appellants, she was a party.

Her appeal should be dismissed as unnecessary, without costs to either party.

All concur, except EARL, J., not voting.

Ordered accordingly.

LOUIS LESERMAN, as Sole Acting Executor, etc., Respondent v.
ISAAC BERNHEIMER et al., Appellants.

Where under and by the terms of a copartnership agreement each partner contributes an equal portion of the capital and is to share equally in the profits and losses, after dissolution, an account taken and a settlement of debts and liabilities, a partner who has advanced moneys to the firm is entitled to be repaid the sum advanced out of the remaining assets before distribution is made.

In case a partner has overdrawn, his share of the residue will be diminished by the amount of the over-draft, and in case this exceeds the share coming to him, he is liable to the other partners for the excess.

In an action for an accounting between partners, it appeared that no time was fixed by the articles of copartnership for its continuance. An account of stock was taken and balance struck as of December 31, 1873, with the understanding between the partners that the partnership was to be dissolved and the business wound up; it was not, however, formally dissolved until March 13, 1874, when an agreement of dissolution was entered into between them, by which defendant B. was given and took charge of the assets, with authority to collect and dispose of the same and to pay the firm debts, and he alone was authorized to sign in liquidation. Prior to December 31, 1873, \$3,000 had been paid out of the copartnership funds on account of defendant G., but had not been charged in account. This sum was on that day, without the knowledge or consent of plaintiff, charged to the account of G. and then was credited to that account and charged to profit and loss, thus leaving an apparent balance of capital due to G.; this he thereafter, but before the final dissolution, drew out. In the accounting the referee charged this sum to B. as the liquidating partner. *Held*, error; that until March 13, 1874, when the dissolution agreement was executed and B. took exclusive charge, he had no more authority or control than the other partners, and so could not be made responsible for the acts of G.

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Also, *held*, that in adjusting the capital accounts between the parties it was proper to allow interest upon the balances standing to their credit down to March 13, 1874.

An action was commenced against the copartners in December, 1873, for an alleged infringement of a patent by the firm, and counsel were employed by it to defend. The action was continued until October, 1876, when it was compromised and release given by the plaintiff therein. B. paid the expenses and disbursements in the defense of the action after the dissolution. It appeared that after L. had concluded to withdraw from the business, B. G. and one S. decided to organize a corporation to continue it. On March 13, 1874, B., as liquidating partner, leased to S. the property and works of the firm with an option to purchase contained in the lease. This was with the knowledge and approval of L., but it did not appear that he knew of the intent to form a corporation or that his copartners were to be members. The corporation was organized and B. transferred to it the bulk of the stock of the firm, and S., in exercise of the option, purchased the leased property for the benefit of the corporation. These transactions were set up in the pleadings, upon the accounting the sums paid for these transfers were stated and the adjustment was made on the basis of the prices received, without objection on the part of plaintiff, who then had full knowledge of all the facts. The referee found that the said release and settlement of the suit pending was brought about in part by the agreement of B. and G. not to carry on the business and the transfer of the stock in trade of the corporation to another corporation for a sum paid to B. and G., and for this reason the referee refused to allow B. for such expenses and disbursements. *Held*, error; that while plaintiff, on learning the fact that his former copartners were benefited by and interested as purchasers in the sales, might have rejected the adjustment of accounts on the basis of the price received, and either have shared in the profits, if any made by them, or repudiating the sales, have held the liquidating partner liable for the value of the property; having, after full notice, concluded to treat the sales as valid, this was a ratification thereof, and defendants were not required to answer concerning the disposition of the property, and their failure to do so was no reason for disallowing the expenses; that all he was entitled to was to have disallowed any portion of the expenses which were made for the exclusive benefit of the new corporation.

B. also paid G. for services rendered by him in said suit after the dissolution. *Held*, that he was entitled to be allowed therefor.

(Argued January 21, 1889; decided March 5, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 24, 1887, which affirmed a judgment entered upon the report of a referee.

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This action was commenced May 20, 1875, by Simon Leserman against Isaac Bernheimer and Jacob Goldsmith for the settlement of accounts growing out of partnership business theretofore carried on by plaintiff and defendants under the name of "Oleophene Oil Company."

During the pendency of the action the plaintiff died, and it was continued in the name of his executrix, Julia Leserman, and she dying it was revived and continued in the name of Louis Leserman, sole acting executor of Simon, the original plaintiff. Both defendants appeared, and the issues made by their answers were tried before a referee, upon whose report judgment was rendered in favor of the plaintiff against Bernheimer for \$47,183.91, and in favor of the plaintiff against Goldsmith for \$12,491.17, and in favor of Bernheimer against Goldsmith for \$41,322.02.

Further facts appear in the opinion.

William G. Choate for appellants. While loans by copartners to the firm are not to be paid out of the assets till all creditors of the firm are fully discharged, yet when that has been done, such loans should next be liquidated out of any remaining assets before there is anything to divide. (*Frigeris v. Crottes*, 20 La. Ann. 351; *Legar v. Peacock*, 109 Ill. 102; *Nowell v. Nowell*, L. R., 7 Eq. Cas. 528; *Wood v. Scoles*, L. R., 1 Ch. App. 369, 377.) If a partner draws on his capital, then he, in theory of law, at once makes good that withdrawal by a repayment to the firm. Until such partner makes good that withdrawal by such repayment, capital account has a claim against that partner for the amount of that withdrawal, and capital account should be credited with that claim against that partner. (*Schultz v. Anderson*, 13 J. & S. 489.) It was error not to allow interest on the balances standing to the credit of the partners, Bernheimer and Leserman, in determining the amount which should be paid to Bernheimer out of the remaining assets, on account of his greater interest in the assets, in order to equalize their capital accounts before dividing between them any surplus. Interest should, at any rate, have been

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allowed down to March 13, 1874, the date of dissolution. (*Johnson v. Hartshorn*, 53 N. Y. 177.)

Robert S. Green for respondent. If any partner has made advances to the firm and others have received advances from it, these do not constitute debts strictly operating until the concern is wound up, but are only items in the account between the partners. (Story on Partnership, 348 a; *Richardson v. Bk. of Eng.*, 4 M. & C. 165, 172; *Buckingham v. Ludlum*, 2 Stew. 345.) When an account is to be taken each partner is entitled to be allowed against the other everything he has advanced, or brought in as a partnership transaction, and to charge his copartner in that account what he has not brought in, and with what he has taken out beyond the proportion to which he was entitled; and nothing is to be considered as his share but his proportion of the residue in the balance of the account. (*West v. Skip*, 1 Ves. Sr. 242; *Price v. Jackson*, 6 Mass. 243; *Butler v. Bullard*, 11 J. & S. 191; *Neudecker v. Kohlberg*, 3 Daly, 407; *McCall v. Moschcowitz*, 10 Civ. Pro. Rep. [Browne] 107, 140; *Jones v. Butler*, 23 Hun, 371.) The rule as to the interest adopted by the referee was more favorable to the appellant than he was entitled to, and if there is any error, it is in appellant's favor. (*Johnson v. Hartshorne*, 52 N. Y. 173, 177; *Watney v. Wills*, L. R., Ch. App. 250; 1 McCord, 213; *Stoughton v. Lynch*, 2 Johns. Ch. 219; *Doughty v. Van Nostrand*, Hoff. Ch. 68; *Andrews v. Andrews*, 3 Bradf. 100; *Buckingham v. Ludlum*, 2 Stew. 351; *Washburn v. Goodman*, 17 Pick. 519; *Dexter v. Arnold*, 3 Mass. 284; *Burdised v. Loughborough*, L. R., 8 Ch. 1; *Honore v. Colmeswil*, 7 Dana, 199, 201.) No allowance for extra services is to be made without express stipulation between the partners. (*Franklin v. Robinson*, 1 Johns. Ch. 159, 165; *Bradford v. Kimberly*, 3 id. 431, 434; *Ca'dwell v. Leiber*, 7 Paige, 483; *Lyon v. Snyder*, 61 Barb. 172; *Johnson v. Hartshorne*, 52 N. Y. 173.) A liquidating partner has no other or greater power than he has as a partner; the only peculiarity is that the

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others have agreed not to exercise their rights of acting. (Parsons on Part. 388; *Nat. Bk. v. Norton*, 1 Hill, 572.) The payment by Bernheimer of \$86,000 to himself relieved the firm from paying interest thereon. (*Johnson v. Hartshorne*, 52 N. Y. 177; *Watney v. Wills*, L. R., 2 Ch. App. 250.)

DANFORTH, J. The capital of the firm was \$225,000, to which each partner contributed \$75,000, under an agreement that each partner should share the profits and bear the losses equally with the others, viz., one-third each. No time was fixed for its continuance, and November 25, 1873, Leserman elected to have the business wound up, and by notice to his partners required that an account should be taken for that purpose. This was done. An account of stock was taken and balance struck as of the thirty-first day of December of that year, at which time, the referee finds, "it was distinctly known and understood by all the parties that the partnership was to be dissolved and wound up in pursuance of the notice already given by Leserman." It was not, however, formally dissolved until March 13, 1874, when the following agreement was executed by the several parties, viz.:

"Agreement made and entered into this 13th day of March, 1874, by and between Isaac Bernheimer, party of the first part, Jacob Goldsmith, party of the second part, and Simon Leserman, party of the third part, witnesseth:

"*First*. That it is hereby mutually agreed that the copartnership heretofore existing between all of the parties hereto under the name and style of the "Oleophene Oil Co." shall be and the same is hereby wholly dissolved.

"*Second*. That the said Isaac Bernheimer only shall have the power and the authority, and the same is hereby accorded and granted unto him, of taking charge of all the assets of the said copartnership, to collect and dispose of the same to the best advantage, to compromise and settle claims of the firm and to pay and meet all the obligations and debts of said copartnership out of the said assets, and is alone authorized to sign in liquidation.

"In witness whereof, the parties to these presents have hereto set their hands and affixed their seals the day and the year first above written.

"ISAAC BERNHEIMER. [L. s.]

"JACOB GOLDSMITH. [L. s.]

"SIMON LESERMAN. [L. s.]

"Sealed and delivered in the presence of

"WM. J. TRIMBLE."

It was found that Leserman had drawn out of his original capital \$10,499.67; that Bernheimer's had increased \$56,621.39; while Goldsmith had drawn out the whole of his and also owed the firm \$897.99. After paying all the liabilities of the firm there remained, according to the report, \$128,920 in the hands of the liquidating partner. This sum is carried to the capital account, and whether its disposition by the referee is correct, presents the first important inquiry. The interest of each partner in the partnership property is his share in the surplus after the partnership accounts are settled and all just claims satisfied. In this case, by the terms of the partnership, the partners were to contribute equally and divide profits and share losses equally from the beginning of the partnership to its dissolution. There is no evidence which requires or would permit any finding that this arrangement had been changed, nor are we referred to such finding. It would seem to follow that the division of profits and charge of losses should be in the proportion of one-third of each to each partner. To carry out that mode of adjustment as the one provided by the agreement of the parties, the advances made by either partner beyond the capital called for by that agreement should be treated as a debt due from the firm and paid out of the surplus before any division is made upon the partnership capital.

If that advance was not in strictness to be regarded as a debt during the existence of the firm, nor until the debts of the firm to third persons were satisfied, it came into that relation the moment those debts were paid, and the concern, as

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regards its business and its outside obligations, wound up. This is an equitable disposition of the matter, for otherwise the larger the advance made for the firm the greater would be the share of losses, or if profits, the greater the share of profits accruing to the partner making the advance, in either case a result entirely opposed to the actual agreement of the parties, which exacted equality in both respects. Nor is the rule opposed to the authorities cited by the respondent.

Story, in speaking of the rights of partners says (Partnership, 348-348 a): "In taking the account between them upon an ordinary dissolution, each becomes chargeable with all the debts and claims which he owes to the partnership, and if any partner has made advances to the firm, and others have received advances from it, these do not constitute debts until the concern is wound up," and *Richardson v. Bank of England* (4 Myl. & Cr. 165), is to the same effect. That was a suit by the representatives of one partner, deceased, to have a general account taken of all the partnership dealings and transactions and to have its affairs finally wound up and closed. The situation of the various partners as to advances and overdrafts was much like the relative position of the partners in the case before us. One of the defendant's copartners had overdrawn, and upon motion that he be required to pay back the sum in question it was denied, upon the ground that until the accounts of the firm had been settled and the joint debts paid what may have been advanced by one partner or received by another can only constitute items in the account. From both authorities it is clear that, after the amount of profit and loss had been ascertained, the partner advancing might have his remedy, and the party who had overdrawn be subject to liability. Before dissolution and an accounting, the one who had advanced money could not compel payment by suit against the firm, for he was one of the firm and so one of the parties owing the money. After dissolution, and before account taken and payment of debts due to others, he could not enforce payment, for the dissolution worked no change in his position. But after these events happened he became entitled

to be paid the sum advanced before the moneys contributed to the firm were returned to the contributors.

Bernheimer was a contributor to capital; he was also in advance of that contribution, and the sum advanced must be repaid before the surplus can be ascertained; and from that surplus alone can there be distribution — then to each partner equally; and, if a loss is incurred, its ratio must be ascertained as originally agreed by the parties. The learned referee has not dealt with the appellant Bernheimer in accordance with these rules. He gives him one-third only of the surplus by reason of his original capital, and in accordance with the same theory the learned referee gives one other third of the surplus to Leserman, and the remaining third to Goldsmith. This method would be well enough if the surplus were sufficient to pay all. But it is not, and, moreover, the advance made by Bernheimer is left entirely unpaid. To cover it, therefore, the sum advanced is divided into three parts, and Bernheimer is given a judgment against Leserman for \$18,873.72, or one-third; a judgment against Goldsmith for a like amount, or one-third, leaving him to bear a certain loss as to the remaining one-third, and imposing on him the risks of collection as against Goldsmith. We think this result is inequitable and not required by any rule or principle of law.

The sum advanced by Bernheimer over his \$75,000 should be first paid from the partnership surplus, and the residue divided among the partners according to the partnership agreement. Of course, Goldsmith, having drawn out his whole capital, could be entitled to no part of the surplus, and Leserman's share would be diminished by reason of the sum already drawn by him. The losses entailed upon the firm by reason of Goldsmith's overdrafts of capital or otherwise, must, of course, be borne equally.

Second. We are also of the opinion that the learned referee erred in charging upon Bernheimer, as liquidating partner, the amounts credited to Goldsmith between the first of January and the 13th of March, 1874. The latter date was the day when, by deliberate and formal act in writing, the

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dissolution was agreed upon and made effective. The letters of Leserman and the negotiations of the parties concerning it were before that inconclusive. It was, then, only that Bernheimer was empowered to act as liquidating partner, and at that time he "took exclusive charge" in that capacity, and continued as such in possession and control of the effects of the firm. Before that event occurred he had no other authority than that of one of three copartners, and it did not exceed that of Goldsmith, for whose acts he is now made responsible. Each partner was equally competent. Concerning it, the finding of the referee is: "That on the thirty-first day of December, 1873, without consultation with the plaintiff, Simon Leserman, and without advising him thereof, but after consultation with Jacob Goldsmith, an item of \$3,000, which amount had been paid out of the moneys of the copartnership in May, 1869, on account of said Jacob Goldsmith, and had since that time been carried as a cash item on a loose slip of paper as chargeable to Jacob Goldsmith, was by direction of Isaac Bernheimer charged to the account of Jacob Goldsmith, and then by the direction of Bernheimer and Goldsmith was credited to Goldsmith's account and charged to profit and loss. That by this credit of \$3,000 to Jacob Goldsmith so made a balance in favor of Goldsmith on capital account was forced, amounting to \$2,102.01, and without such credit he would appear on December 31, 1883, as debtor on his capital account to the amount of \$897.99. That all this was done without the approval, consent or knowledge of said Simon Leserman, and against the balance so found payments have been made."

It is, however, apparent that the thing complained of was only the final and natural act of a series which originated in 1869, when confessedly each partner had equal authority, and of which act each partner, by virtue of his relation to the others, must be charged with knowledge. But the objection to the item and the finding of the referee stand upon the assumption that the firm was, in fact, dissolved when the item of \$3,000 went upon the books and credit was given to Gold-

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smith on account of it. That assumption, we think, was erroneous. He was still a member of the firm and, as such, competent to draw the check on which the money was paid.

Third. We are of opinion that, in adjusting the capital accounts between the partners, interest should have been allowed upon the balances standing to their credit down to the 13th of March, 1874, which we are constrained to find was the time of actual dissolution of the firm.

Fourth. The remaining questions relate to the disallowance of expenses growing out of an action in favor of "The Combined Patent Can Company," and payment made to Goldsmith for services in defense of that action. The defense was commenced on the 11th of December, 1873, by the employment by the firm of counsel, and it continued, as the referee finds, until October, 1876, when the cause of action was settled by compromise, although it appears that counsel in the case were dispensed with and discontinuance of the suit directed as early as June 10, 1875. (1.) As to the expenses: The suit was in equity in the Circuit Court of the United States, and the bill of complaint charged that Bernheimer, Leserman and Goldsmith were copartners, and as such transacted business under the firm name of "The Oleophene Oil Company," and in the course of that business infringed certain patents owned or controlled by the plaintiffs therein. An injunction was asked for, and damages. The evidence shows that the case was of importance, and the counsel employed therein testified to its gravity. As to that and the apprehended results, no question is made. On the 6th of October, 1876, "The Oleophene Oil Company," a corporation which by purchase had succeeded the firm, turned over or sold its works to "The Combined Patents Can Company," and the latter executed a paper reciting that "in consideration of the payment to it of one dollar by said Isaac Bernheimer, Jacob Goldsmith and Simon Leserman, the receipt of which 'was acknowledged,' and for other good and valuable considerations," we do hereby release and forever discharge the said Isaac Bernheimer, Jacob Goldsmith and

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Simon Leserman, of and from all actions, causes of actions, suits, controversies, claims and demands whatsoever, for or by reason of any matter, cause or thing in said bill of complaint set forth or claimed."

It is apparent that the suit grew out of the conduct of the firm in its proper business. A recovery would have involved the defendants in their partnership character, and in the absence of any special agreement to the contrary, we are unable to see why the items disbursed by either member of the firm in that litigation and for its benefit should not have entered into the partnership accounts, to be settled in the usual way.

The learned referee finds, in regard to this matter, that the release and settlement of the action was brought about in part by the agreement of Isaac Bernheimer and Jacob Goldsmith, not to carry on the oil business for twenty years, and the transfer of the stock in trade and the personal property of "The Oleophene Oil Company," incorporated, to "The Devoe Manufacturing Company," for \$155,000, paid to Bernheimer and Goldsmith, no part of which is brought into this accounting. For that reason he disallowed the expenses of the suit. In view of other facts found and the uncontradicted evidence, this reason seems to us insufficient. It appears that after Leserman decided to retire from business, Bernheimer and Goldsmith and one Simon Bernheimer concluded to form a company, under the laws of the state, to carry on the same business as that of "The Oleophene Oil Company." They intended to alter and make additions to the works at the manufactory, with a view to the more rapid production of oil and the making of cans for its reception, and began to carry out this purpose by contracts in their own name as early as December, 1873. On the 13th of March, 1874, Bernheimer, the liquidating partner, leased to Simon Bernheimer the property and works of the firm at an annual rent of \$15,750, with an option to Simon to purchase that and other property within a certain time at the price of \$225,000. This was with the

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knowledge and by the approval of Simon Leserman, but there is no evidence that he knew, as the fact was, that the lease and agreement were really for the company intended to be incorporated, nor that Bernheimer and Goldsmith were to be members thereof.

That corporation was formed and the bulk of the stock in trade of the late firm was on the 6th of April, 1874, transferred by Isaac Bernheimer to that corporation for the sum of \$68,000. The option given Simon Bernheimer was exercised and the purchase completed by paying the sum of \$225,000, partly in cash, partly by bond and mortgage, and the balance by assuming a mortgage, and the conveyance to him was for the benefit of the corporation. These sales and transfers were all set up by answer of the defendants in this action, and upon the accounting the various sums mentioned are fully stated. No exception was taken to them. The property sold was the property of the firm and sold as such; it was accounted for as such and the plaintiff had the benefit of his share of it. If at the time he approved of those sales he was in ignorance that his former copartners were benefited by and interested in them, he was not kept in ignorance, but during the process of accounting the fact was disclosed, and he might then have rejected the adjustment of the accounts upon the basis of the price received and shared with his former associates the profit, if any, made by them, or repudiating the sale altogether, held the liquidating partner responsible for the value of the property as it might be proven. He did neither. Indeed, the conduct of his copartners cannot be considered as in any respect to his prejudice. He did not intend to go on in business there or elsewhere. He was intending to retire absolutely. The property was to be sold, and unless an advantage was taken by the other parties and for their benefit, by reason of their situation, there was no ground for complaint.

It does not seem to have been so intended. But however that may be, he had in due season full knowledge of the whole matter. He had personally approved of the sales without knowing, indeed, of the interest of his former partners; he

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knew of the sum realized, and, before accepting his share of it, was informed that both Bernheimer and Goldsmith occupied in part the position of purchasers — were members of the company. Having, after this notice, concluded to treat those sales as valid, his ratification relates back to the time of their original making and validates them from that time. They were all consummated before 1875, and the defendants were under no obligation to answer concerning the disposition of the same property made in 1876. Neither the avails nor benefits of it could, in any reasonable view, be required from the defendants. Their failure to bring them in, therefore, furnishes no reason for disallowing the expenses of the suit for which it is plain the copartners were, to some extent, liable. But if, upon a rehearing, it should appear that any portion of these expenses were made for the exclusive benefit of the new firm or organization, that portion would be properly disallowed to Bernheimer. (2.) And so in regard to payments made to Goldsmith for services in the canning suit after dissolution. It is conceded by the learned counsel for the respondent "that Bernheimer in settling a claim would have a perfect right to make a binding bargain with a stranger," but he denies that he could do so with Goldsmith, who occupied the relation of partner. By the articles of dissolution Bernheimer was expressly authorized to act for and in the place of the firm, and given authority to take charge of all the assets and collect and dispose of the same to the best advantage; to compromise and settle claims of the firm, and to pay and "meet all the obligations and debts of the copartnership and of the said assets." He of all the partners alone had this power. It was his duty to protect the property against diminution by unjust judgments, and we think the authority given him, if followed in good faith, was sufficient to justify an arrangement with Goldsmith to attend to the litigation so far as it affected the late firm, and his compensation for such services should, in the same proportion with the other expenses of the litigation, be allowed Bernheimer.

For the errors adverted to, and to enable the views

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above expressed to be carried out, the judgment of the court below, and that entered against Bernheimer upon the report of the referee, should be reversed and a new trial granted, with costs to abide the event.

All concur, except EARL and PECKHAM, JJ., who agree, except as to power of liquidating partner to employ Goldsmith for a compensation to be paid to him.

Judgment reversed.

HUGH LOWERY et al., as Executors, etc., Appellants, v. SARAH ERSKINE, Respondent.

Where, upon appeal in an action tried by the court, the General Term reverses the judgment and it appears by its order that the reversal was upon questions, both of law and fact, it will be deemed to have based its decision upon errors of fact, if that be necessary to sustain such decision.

It seems that to justify a reversal upon the facts by the General Term, it must appear that the findings were against the weight of evidence, or that the proofs so clearly preponderated in favor of a contrary result that it can be said with a reasonable degree of certainty that the trial court erred in its conclusions.

Where securities for loans are taken by one person in the name of another, the presumption is that they are the property of the latter, and the possession of the securities by the former, where it appears that he was the agent of the latter, will be deemed to be that of his principal.

J., plaintiff's testator, loaned certain moneys to various parties, taking bonds and mortgages and a promissory note, all payable to defendant, all of which were in J.'s possession at the time of his death. In an action to recover possession of said securities, which plaintiffs alleged to have been the property of the testator, and to have been unlawfully taken by defendant from them, it appeared that J. had moneys in his hands belonging to defendant, who was his niece; that he stated to the borrowers and to others that the moneys loaned belonged to defendant; that at his request defendant had executed to him a power of attorney, among other things, "to govern and control all bonds and mortgages, to sell and transfer the same, * * * to take charge of all personal property * * * that he may now have in his possession." The only explanation on the part of plaintiffs was a declaration contained in a paper alleged to have been delivered by the testator to one of the plaintiffs

118	52
152	168

113	52
155	591

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prior to his death, wherein he expressed his wishes with reference to the disposition of these securities after his death, and stated that he had taken the mortgages in the name of his niece to avoid being taxed for the same. *Held*, that such declaration was incompetent to defeat the defendant's title; and that a finding of the trial court that plaintiffs were entitled to the securities was not justified by the evidence and was properly reversed by the General Term.

(Argued January 18, 1889; decided March 12, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 9, 1887, which reversed in part upon questions of fact, as well as law, and affirmed in part a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

The nature of the action and the material facts are stated in the opinion.

M. H. Hirschberg for appellants. There was no executed gift of the securities to the defendant during her uncle's lifetime, and no trust created with respect to them. (*Hunter v. Hunter*, 19 Barb. 631; *Fulton v. Fulton*, 48 id. 581; *Maynard v. Maynard*, 10 Mass. 456; *Stilwell v. Hubbard*, 20 Wend. 44; *Bedell v. Carl*, 33 N. Y. 581; *Fisher v. Hall*, 41 id. 416; *Curry v. Powers*, 70 id. 212; *Young v. Young*, 80 id. 422; *Jackson v. Twenty-third St. R. R. Co.*, 88 id. 520; *Stokes v. Pease*, 19 Week. Dig. 310; *Matter of O'Gara*, 15 N. Y. S. R. 737; *Shurtleff v. Francis*, 118 Mass. 154; *Basket v. Hassell*, 107 U. S. 602; *Pope v. Savings Bk.* 56 Vt. 284; *Taylor v. Henry*, 48 Me. 550; *Jackson v. Phipps*, 12 Johns. 418; *Jackson v. Bodle*, 20 id. 184; *Elsey v. Metcalf*, 1 Den. 323; *Church v. Gilman*, 15 Wend. 656; *Wilsey v. Dennis*, 44 Barb. 354; *Day v. Mooney*, 6 T. & C. 382; *Best v. Brown*, 25 Hun, 223; *Knolls v. Barnhart*, 71 N. Y. 474; *Gifford v. Corrigan*, 105 id. 223; *Shuttleworth v. Winter*, 55 id. 625.) The testator did not manifest an intention to give the securities to defendant. (*Doty v. Wilson*, 47 N. Y. 580.) The instrument executed by the testator August 22, 1885, is void as a testamentary disposition. (*In re Diez*, 50 N. Y. 93;

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5 Dem. 179.) The statute against resulting trusts has no application. (*Van Rensselaer v. Sheriff*, 1 Cow. 501-509; *Robbins v. Robbins*, 89 N. Y. 251.) The title to the securities has not been affected by the transaction between Mrs. Sears and the defendant since the testator's death. (Pollock on Prin. of Contracts, 161; *Crosby v. Wood*, 6 N. Y. 369.)

E. A. Brewster for respondent. The testator made a valid gift to the defendant of whatever money of his own was invested in the securities in question. (*Martin v. Funk*, 75 N. Y. 134; *Willis v. Smyth*, 91 id. 297; *Francis v. N. Y. & B. R. Co.*, 108 id. 94; *Wilsey v. Dennis*, 44 Barb. 354; *Grangiac v. Arden*, 10 Johns. 293; *Sanford v. Sanford*, 45 N. Y. 725; 58 id. 69; *Jackson v. Feller*, 2 Wend. 465; *Renfrew v. McDonald*, 11 Hun, 254.)

RUGER, Ch. J. The appeal in this case requires us to examine and determine the questions of fact involved in the issues tried. The action was brought by the executors of John Erskine to recover from the defendant three several choses in action, alleged to have been the property of their testator, and to have been unlawfully taken by her, from the executors. The answer denied that such securities were the property of John Erskine, and alleged the title thereto to be in the defendant. The trial court, after a hearing, rendered judgment for the plaintiffs for two of the items specified, and for the defendant upon the remaining claim. The defendant appealed to the General Term upon exceptions to the findings, from the whole and every part of such judgment; and the plaintiffs from that part which favored the defendant. The General Term, upon questions both of law and fact, reversed so much of the judgment as was in favor of the plaintiffs and ordered a new trial thereof, and affirmed so much as favored the defendant. From this judgment the plaintiffs appealed to this court upon a stipulation for judgment absolute in case of affirmance.

The General Term having authority to hear appeals, both

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upon the law and the facts, must be deemed to have determined them upon errors of fact, if that be necessary to sustain their judgment. (Code of Civ. Pro. § 1338, subd. 1, § 1346; *Verplanck v. Member*, 74 N. Y. 620.)

The most important issue of fact made by the pleadings and tried by the court was, whether the moneys, for which the securities in dispute were given — belonged to the testator or to the defendant. The trial court found that they were the property of the testator, but ordered judgment for the defendant for one of the securities in dispute, upon the ground that a valid transfer thereof had been made to her, by the executors after the testator's death. The finding that the moneys loaned were the property of John Erskine was excepted to by the defendant, and it must now be deemed to have been reversed by the General Term upon her appeal.

The important question before us is, therefore, whether this reversal was authorized by the evidence. If it was, the same consideration controls the disposition of the order of affirmance, since the evidence upon the disputed question of fact applies with equal force to each of the securities in question.

The rule governing appellate tribunals in reviewing questions of fact is stated in *Baird v. Mayor, etc.* (96 N. Y. 577), to be "to justify a reversal it must appear that such findings were against the weight of evidence, or that the proofs so clearly preponderated in favor of a contrary result that it can be said with a reasonable degree of certainty that the trial court erred in its conclusions." (*Crane v. Baudouine*, 55 N. Y. 256; *Westerlo v. De Witt*, 36 id. 344.) Having this rule in view, we proceed to an examination of the evidence. The proof showed that the testator was a clergyman residing in a village in Orange county, N. Y., and in 1871 visited his brother, the defendant's father, in Ireland. Upon his return to this country he brought back the defendant, then a young girl of about sixteen years of age. Between that time and the death of her uncle, in 1885, she resided most of the time with her brother at St. Louis and

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elsewhere, at a distance from the testator. After the death of her uncle she, upon request, visited Mrs. Sears, one of the executors, with whom and her mother the testator resided at the time of his death, and was then shown the securities in question, with some others, and also a paper purporting to be signed and sealed by the testator, containing a declaration of his wishes in regard to the disposition of the securities exhibited. The securities, here in dispute, consisted of, first, a bond and mortgage for \$2,500, executed by Joseph Clineman to Sarah Erskine, dated March 1, 1882, and recorded May 17, 1882; second, a bond and mortgage executed by Ann E. Constable and others to Sarah Erskine, dated December 28, 1883, and recorded February 5, 1884; third, a promissory note made by one Jameson, dated February 1, 1884, payable to Sarah Erskine for \$100. The plaintiff Sears testifies that the declaration of testator's intentions, together with the Schoonmaker mortgages, referred to in such declaration, were given to her August 22, 1885, and that she retained them in her possession until testator's death, September 26, 1885; that the other securities were placed in a safe of which she had the key, and remained there until after the testator's death, when she took them into her possession. There was an inside safe where the testator kept his private papers and of which he kept the key. It also appeared that each of these securities was given at the time they respectively bear date, in consideration of loans of money negotiated by the testator, and that such moneys were paid to the respective borrowers by him. It also appeared that Erskine stated to Clineman and Jameson, two of the borrowers, at the time of their respective loans, that the money loaned belonged to or was the money of his niece, the defendant, and to another witness "that he had taken a mortgage of \$1,000 on Mrs. Constable's farm and had the papers made out in Sarah Erskine's name. * * * I have given it to her and I expect to do more for her than that." It also appeared that the defendant's father, at the time she left Ireland, delivered to the testator a sum of money, which he described to be the defendant's portion of his property.

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The defendant was never informed of the amount by either her father or uncle, and it did not appear affirmatively in the case what the amount was.

The testator never rendered any statement to the defendant of his transactions in her name, and she was ignorant of their extent, or even of their existence, until after his death. Two witnesses testified to declarations made to them by the testator about the time he returned from Ireland, and at other times, that defendant's father had given him money in trust for Sarah. Two of the plaintiffs testified to declarations made to them by their testator, one upon an application by him to borrow money, that "he had some money he was putting out of Sarah Erskine, his niece;" and the other, that he told him "the amount of the mortgages belonging to Miss Erskine," and that "the mortgages that were in Miss Erskine's name he meant them for her;" that he didn't want them taken off of record. To another person, a brother clergyman, he said, a year or so before his death, "that he had made provision for his niece in St. Louis; he had given her, or had a bond and mortgage in her name to the amount of — I am not positive, but I think \$3,000. That he had put it in this way in order that, at his death, it might be hers, so she could receive it without going through the hands of executors or the uncertainties of a will." To another witness, who borrowed of him \$800, in 1882, he stated that the money loaned "was Sarah Erskine's money." It also appeared that none of these securities standing in the name of Sarah Erskine were appraised or inventoried by the executors, although they were then in their possession; and upon the trial each of the executors denied giving authority for the commencement of this action. In 1882, the testator wrote to the defendant at St. Louis several times, urging her to send him a power of attorney authorizing him to transact business in her name, which she then declined to give. In 1883, however, upon a visit to him in Orange county, she was persuaded to execute a power of attorney to the testator, appointing him "my true

and lawful attorney for me and in my name, place and stead, and to my use to exercise the general control and supervision over all my lands, tenements, that I now own, to grant, bargain and sell any of my real estate, to govern and control all bonds and mortgages, to sell the same and transfer the same as he may deem just and proper, to take charge of all personal property, bank account and other personal property that he may now have in his possession."

The inference to be drawn from the declarations referred to, that the moneys loaned by the testator in making these investments, either originally belonged to defendant or had become hers by some valid transfer, seems irresistible. (*Trow v. Shannon*, 78 N. Y. 448.) While some of them are consistent with a future intention to make gifts of some kind to his niece, none of them conflict with the express statements that the specific property which he described as being hers was so in fact at the time of his declaration.

In the consideration of this evidence we undoubtedly start with the presumption that the securities taken in her name were the property of the defendant. In the absence of any explanation or contradictory evidence, the legal title of choses in action must be deemed to be in the person to whom they are payable, and by whom alone they can be enforced. (*Sanford v. Sanford*, 45 N. Y. 723; *S. C.*, 58 id. 69; *Holliday v. Lewis*, 14 Hun, 478; *Central Bank of Brooklyn v. Hammett*, 50 N. Y. 159.) This presumption would be much strengthened where the securities are found in the possession of an agent of the payee, whose possession would, in such case, be deemed that of his principal. (*Rawley v. Brown*, 71 N. Y. 85.) This is doubtless a presumption which may be overcome by proof; but, in the absence of proof, it requires a finding that the defendant was entitled to the possession of the securities. The act of the testator in procuring a power of attorney to manage and control the defendant's property in his possession furnishes a strong presumption that he was then possessed of such property, and is manifestly inconsistent with the idea that he obtained it for the purpose of transacting his

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own business for his own benefit. The evidence referred to would certainly authorize a finding that the money invested in the securities, taken in the name of the defendant, belonged to her (*Trow v. Shannon*, 78 N. Y. 448; *Hunter v. Hunter*, *supra*; *Holliday v. Lewis*, *supra*; *Tucker v. Bradley*, 33 Vt. 327); and, if necessary, that he held such securities in trust for her. (*Day v. Roth*, 18 N. Y. 448.)

We are of the opinion that the case made by the defendant was not sufficiently answered by the plaintiffs. The only explanation suggested for the oft-repeated and explicit declarations of the testator, that the money invested by him belonged to the defendant, was that they were untrue and were made, and the securities taken in defendant's name for the purpose of evading taxation. The lack of integrity which this explanation imputes to the testator might well cause his executors to deny connection with a prosecution which revealed it, and should have great weight in considering the evidence bearing on the question. The maxim, "*Allegans suam turpitudinem non est audiendus*," applies in this connection as well to personal representatives as to the testator himself. If considered at all, the proof to establish it should be at least competent, clear and explicit. We find no such proof in the case. No direct evidence was given by the plaintiffs as to the ownership by the testator of the moneys invested in these securities, except that arising from the presumption growing out of their possession. He being the agent of the defendant, that possession was equally consistent with their ownership by the defendant as with that of the testator. (*Rawley v. Brown*, 71 N. Y. 85.) It was said in that case: "If the custody and possession is shown to be equally consistent with an outstanding ownership in a third person as with a title in the one having possession, no presumption of ownership arises solely from such possession." It was, perhaps, impossible to produce direct evidence, after the death of the testator, of his title to the securities, but the plaintiffs might have shown by the evidence of testator's brother, which was obtainable, the amount of money which

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he intrusted to the testator for the defendant in 1871. It was quite as incumbent upon them to produce this evidence as it was for the defendant to do so.

We think that the trial court placed undue weight upon the fact that defendant did not produce this evidence, and drew the inference from this, and other circumstances, that the amount of money received by the testator from defendant's father was inconsiderable. We think this inference was unwarrantable. The sum seemed sufficiently large to cause the testator to mention it to several persons immediately upon his return from Ireland, when he would seem to have had no motive to create false impressions as to the fact. He also referred to it at other times. We attach little weight to the declarations of the defendant in respect to these transactions. She was confessedly ignorant of their nature and extent, and statements made by her, in ignorance of the truth, cannot be regarded as evidence to disprove the evidence upon which her claims are now predicated. The entries in the testator's diary bearing upon the question of the ownership of the moneys invested by him, were incompetent. Such entries were admitted for the sole purpose of affording a standard for the comparison of handwriting, and were not competent for any other purpose.

The principal evidence, therefore, produced by the plaintiffs bearing upon this question, is the testator's declaration contained in the paper wherein he expressed his wishes with reference to the disposition of these securities after his death. In that he says, "I have taken three mortgages in my niece Sarah Erskine's name to avoid being taxed for same." This evidence was not objected to by defendant, and could not have been excluded if it had been, as it was competent, in view of its connection with the transaction through which the defendant obtained possession of the securities. This paper had no effect as a testamentary disposition of property, and was, therefore, a mere declaration in his own favor by the testator tending to invalidate title to the securities which he had previously taken for the defendant. It was clearly

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incompetent as evidence to defeat the defendant's title. (*Tousley v. Barry*, 16 N. Y. 501; *Woodruff v. Cook*, 25 Barb. 505; *Brown v. Mailler*, 12 N. Y. 118.)

Other considerations bear upon the weight which could properly be given to this declaration. The body of the instrument was in the handwriting of the plaintiff Mary Ann Sears, who was the residuary legatee of the testator, and was made about a month previous to his death when he was too feeble to write it himself. The genuineness of the testator's signature was a contested fact in the case. The statement made therein was inconsistent with the uniform and repeated declarations of the testator during his lifetime to numerous persons of the most unimpeachable character. Other circumstances of minor importance have been referred to as bearing upon the issue, but none of sufficient weight to overcome the conclusions reached by the General Term upon the facts, and we are, therefore, of the opinion that the reversal of the findings of the trial court was justified upon the evidence. An able discussion of the questions relating to the sufficiency of the evidence to establish a valid gift *inter vivos*, or an enforceable trust as to the property in dispute was made by the appellants' counsel, but the contention in respect thereto was based upon the assumption that the moneys invested belonged to the testator. The finding of fact to that effect having been reversed, the argument founded upon it necessarily falls.

We have also thought it unnecessary to consider the effect which the recording of the mortgages by the testator, and his position as defendant's agent, had upon the question of a delivery of them to the defendant. (*Munoz v. Wilson*, 111 N. Y. 295.) He was undoubtedly an agent for the purpose of managing and controlling securities for her, and his possession of such securities might be deemed the possession of the principal in such a sense as to effect a valid delivery to her (*Central Bank v. Hammett*, *supra*; *Tucker v. Bradley*, *supra*; *Rawley v. Brown*, *supra*), but we do not now desire to pass upon this question.

The views expressed lead to an affirmance of the order of

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the General Term and an order for judgment absolute in favor of the defendant, with costs to be paid from the estate.

All concur.

Order affirmed, and judgment accordingly.

In the Matter of the Probate of the Last Will and Testament
of HENRY P. EYSAMAN, Deceased.

Where, upon the trial of an issue of fact by a surrogate, the evidence on each side is so nearly balanced that a determination either way would not be reversed upon appeal, it may not be said that the losing party is not prejudiced by material testimony of an incompetent witness, given under objection and exception, and the admission of such testimony is error requiring a reversal.

Where the probate of a will is contested on the ground of want of testamentary capacity on the part of the testator, and that the will was not duly executed, a legatee or devisee, who is not a subscribing witness, is not competent, under the Code of Civil Procedure (§ 829), to testify to personal transactions or communications with the decedent, preceding, attending or succeeding the execution of the will.

This rule excludes not only testimony of transactions directly between the witness and the deceased and communications made by the latter to the former, but of any transaction between the deceased and others, in any portion of which the witness participated, or any conversation in his hearing, although not with or addressed to him; also, any testimony as to the acts and conduct of the testator observed by the witness tending to show mental capacity.

Cary v. White (59 N. Y. 896) distinguished and questioned.

The provision of said Code (§ 2544), providing that "a person is not disqualified or excused from testifying respecting the execution of a will by a provision therein whether it is beneficial to him or otherwise," refers only to the subscribing witnesses to a will; it does not operate as a repeal by implication, so far as it relates to testimony as to the execution of a will of the prohibitory clause above referred to; nor does it authorize or permit a beneficiary under the will to testify where, under the former clause, his testimony would be excluded.

(Argued January 25, 1889; decided March 12, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order

113	62
113	158
113	62
121	577
113	62
124	510
125	758
113	62
126	683
113	62
141	322

113	62
164	245

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made July 1, 1886, which affirmed a decree of the surrogate of the county of Herkimer, admitting to probate the will of Edward P. Eysaman, deceased.

The material facts are stated in the opinion.

George W. Smith for appellants. The execution of the will is not proven by two witnesses. (*Mitchell v. Mitchell*, 16 Hun, 97; 77 N. Y. 596; *Sisters of Charity v. Kelly*, 67 id. 409; *Heath v. Cole*, 15 Hun, 100; *Howland v. Taylor*, 53 N. Y. 627; *Reynolds v. Root*, 62 Barb. 250; *Willis v. Mott*, 36 N. Y. 486; 110 id. 596; *Neugent v. Neugent*, 2 Redf. 369; *Chaffee v. B. Miss. Con.*, 10 Paige, 91; *Remsen v. Brinckerhoff*, 25 W. R. 331; *Rutherford v. Rutherford*, 1 Den. 33; *Belding v. Leichhardt*, 56 N. Y. 680; *Lewis v. Lewis*, 11 id. 225; *In re Phillips*, 98 id. 267; *Baskin v. Baskin*, 36 id. 416; *Wooley v. Wooley*, 95 id. 235.) Inability to remember an essential testamentary declaration in the case of a will lately executed is fatal, and the inability cannot be supplied by a false attestation clause. (*Wilson v. Hetterick*, 2 Bradf. 427; *Rutherford v. Rutherford*, 1 Den. 33; *Seymour v. Van Wyck*, 6 N. Y. 120; *Scribner v. Crane*, 2 Paige, 147.) The change effected by the will from giving a deed of one hundred acres of land for a discharge of the claims amounted to near \$24,000, and was so radical and sweeping that it cannot be credited. (*McLaughlin v. McDavitt*, 63 N. Y. 212; *Children's Aid Soc. v. Loveridge*, 70 id. 402; *Delafield v. Parish*, 25 id. 35; *Marsh v. Tyred*, 2 Hagg. 87, 110; *Blewitt v. Blewitt*, 4 id. 463; *Van Guysling v. Van Keuren*, 35 N. Y. 70.) The fact that the draughtsmen of the will was the attending physician calls for close scrutiny. (*McGuire v. Kerr*, 2 Bradf. 245; *Mowry v. Selber*, 2 id. 133; *Tyler v. Gardiner*, 35 N. Y. 559, 591; *Lake v. Ramsey*, 33 Barb. 49; *Newson v. Newson*, 2 Keyes, 229; *Crispell v. Dubois*, 4 Barb. 393; *In re Smith*, 95 N. Y. 516.) The testimony given by Ware of a conversation between deceased and himself was incompetent under section 829 of the Code. (*Holcomb v. Holcomb*, 95 N. Y. 316; *Lane v. Lane*, Id. 494;

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Hatter v. Smith, Id. 516; *Schoonmaker v. Wolford*, 20 Hun, 166; *Cadmus v. Oakley*, 3 Den. 324.)

J. D. Henderson for executors, respondents. The legal presumption is in favor of competency. Every man is supposed to be sane until he is proved otherwise. (*Colt v. Patchen*, 77 N. Y. 553; *Delafield v. Parish*, 25 id. 9; *Van Guysling v. Van Keuren*, 35 id. 70.) The will was properly executed. (*Baskin v. Baskin*, 36 N. Y. 416; *Jackson v. Jackson*, 39 id. 153.) If Barse, one of the witnesses, forgot some of the things which occurred at the time the will was executed, his failure to recollect will not defeat the probate. (*Rugg v. Rugg*, 83 N. Y. 592; *Matter of Kellum*, 52 id. 517; *Matter of Higgins*, 94 id. 554; *Brown v. Clark*, 77 id. 369; *Matter of Cottrell*, 95 id. 330.) If, on a review of the several exceptions taken by the contestants, this court should think that some of them were well taken, still the decree of the surrogate should not be reversed. (Code Civil Pro. § 2535; *Brick v. Brick*, 66 N. Y. 144; *In re Smith*, 95 id. 527.) It was proper to call James Ware, although a legatee under the will, to give his version of the transaction testified to by the contestant's witness, Horace Eysaman, and he was competent under section 829 of the Code. (*Marsh v. Brown*, 18 Hun, 319, 323; *Smith v. Christopher*, 3 Hun, 586; Code, § 2544; *Pinney v. Orth*, 88 N. Y. 451; *Simmons v. Sisson*, 26 id. 277; *Hildebrandt v. Crawford*, 65 id. 107; *Cary v. White*, 59 id. 336; *Holcomb v. Holcomb*, 95 id. 325.) The allowance of costs and disbursements and the judgment of \$650.50 against the contestants, was a question entirely within the discretion of the surrogate. (Code, § 2558.)

C. J. Palmer for James Ware, respondent. The execution of the will was proven to be in accordance with the statute. (*Lewis v. Lewis*, 11 N. Y. 224; *In re Cottrell*, 95 id. 335; *Orser v. Orser*, 24 id. 55; *Blake v. Knight*, 3 Curt. 547.) Even if Barse had forgotten, or from perversity had denied, the execution, still the question of execution would be a fact,

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and the decision of the surrogate final upon the fact. (*In re Cottrell*, 95 N. Y. 329, 338; *In re Higgins*, 94 id. 557; Code, § 2620; *Brown v. Clark*, 77 N. Y. 369; *Rugg v. Rugg*, 88 id. 592; 21 Hun, 383; *Lewis v. Lewis*, 11 N. Y. 220; *Trustees v. Cahoon*, 24 id. 425.) The issues having been all decided in favor of the proponents, if there is any evidence to support the findings the appellate court will not reverse. (*In re Cottrell*, 95 N. Y. 325; *Gilbert v. Luce*, 11 Barb. 91; *Roosa v. Smith*, 17 Hun, 138; *Hewlett Case*, 103 N. Y. 156.) Upon the issue of undue influence the burden is upon the party alleging it. (*In re Martin*, 98 N. Y. 193; *Tyler v. Gardner*, 35 id. 559; *Delafield v. Parish*, 25 id. 35; *Coit v. Patchen*, 77 id. 539, 541; *Cowee v. Comell*, 75 id. 101; *Carpenter v. Soule*, 88 id. 257; *Gorham v. Price*, 25 Hun, 11.) Both Sharer and Barse being disinterested, unimpeached and uncontradicted as to what took place at the execution, their uncontradicted testimony must be followed. (*Koehler v. Adler*, 78 N. Y. 287; *Robinson v. McManus*, 4 Lans. 380, 387; *Newton v. Pope*, 1 Cow. 109; *Elwood v. Telegraph Co.*, 45 N. Y. 553; *Hildebrandt v. Cranford*, 65 id. 107; 52 How. Pr. 460.) Ware's contradiction of Horace Eysaman was not objected to under section 829 of the Code; the objection being general cannot avail here. (*Stevens v. Brennan*, 79 N. Y. 254; 14 W'kly Dig. 154; *In re Morgan*, 104 N. Y. 75; Code, § 2554; *In re Yates*, 99 N. Y. 101; *Vancouver v. Bliss*, 11 Ves. 458; *Thrall v. Chittenden*, 31 Vt. 183; *Sanders v. Frost*, 5 Pick. [Mass.] 260; *Spencer v. Spencer*, 11 Paige, 299; *Rundle v. Allison*, 34 N. Y. 180.) It was proper for Dr. Sharer to steady Eysaman's hand at his request, or to write the subscription. (*Campbell v. Logan*, 2 Brad. 95; Redfield on Sur. 159; Revised Statutes [7th ed.] 2286.) The testimony not only shows the writing by deceased, but an acknowledgment that the subscription is his. The acknowledgment alone is sufficient if it appears he saw and knew it. (*Hoystradt v. Kingman*, 22 N. Y. 372; *Baskin v. Baskin*, 36 id. 416.) As Ware did not engage in

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the conversation at the declaration of the will, but testified to what he heard under objection, he was competent to speak. (*Hildebrandt v. Crawford*, 65 N. Y. 107; 6 Lans. 502; *Patterson v. Copeland*, 54 How. Pr. 460; Code, §§ 2513, 2545, 2559; *In re Brown*, 65 How. Pr. 464.)

RUGER, Ch. J. The probate of the will of Henry P. Eysaman was contested before the surrogate by some of his heirs and next of kin, upon the ground of undue influence, the want of a sound disposing mind and memory, and the absence of sufficient proof of due execution by the testator. The main question now presented is, whether James Ware, the principal legatee, was competent to testify to the transactions preceding, attending and succeeding the execution of the will, and, if not, whether his evidence on those subjects necessarily prejudiced the contestants in the controversy before the surrogate. The allegation of undue influence was not supported by sufficient evidence to authorize us to review the finding of the surrogate upon that question, and the inquiries must now be addressed to the questions of due execution and the existence of testamentary capacity at the time of its execution, as affected by the evidence of Ware. The decree of the surrogate admitted the will to probate, and his decision was affirmed, on appeal, by a divided court. The will purported to have been executed on Sunday, April 27, 1884, and the testator died on Thursday, four days thereafter, of uræmia, or blood poisoning, at the age of seventy-eight years. The material evidence, bearing upon the questions of mental and physical condition, related mainly to the period of one week preceding the testator's death. The evidence showed that the testator was afflicted with gravel or retention of urine, and had been in failing health for about two months before his death, being much of the time confined to his bed, and during the last week of his life wholly so. Up to Saturday, the evidence shows that he was, although feeble, apparently conscious, talking occasionally with visitors and attendants, and able to transact some business and to give

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orders concerning the management of his ordinary affairs. On Saturday, after engaging in two transactions, he claimed to be too much exhausted to do any more that day. Thereafter, he undertook no business transaction except that of the execution of his will, and his physical condition seems to have become weaker. He talked but little, if at all, and gradually declined until he died. His physician testified that, on Monday, he observed symptoms of the suppression of urine, which became quite pronounced on Tuesday, and were accompanied by drowsiness and coma, which generally prove fatal in from two to five days after such symptoms appear. Others testified that some of these symptoms were observable on Sunday. No witnesses, except Sharer and Ware, testify that after Saturday night he engaged in any rational conversation, beyond occasional calls for nourishment or attempts to utter some name. The conversation attending the publication of the will was testified to by Sharer and Ware alone, and their version was much impaired, if not contradicted, by Barse, the only other person who was present at the time. Many persons saw him between Saturday and the day of his death, but none of them testify to any material conversation had by him, except Sharer and Ware, although other persons were present at most of the occasions described by them.

The conversation taking place at the time of the execution of the will, as testified to by Sharer, who drew it, consisted almost wholly of alleged answers made to questions put to him by Sharer, and was substantially as follows: "I handed the will to him on Sunday morning and left the room; he soon sent for me and handed me the will and said 'it is all right; he said he would sign it; he was in bed when he signed it; wrote upon a book; Mr. Barse then signed as one of the witnesses; Mr. Ware and myself were in the room when Barse came in; he said good morning to Mr. Eysaman and Mr. Eysaman said good morning 'Irve; I said to Mr. Eysaman, is this your last will and testament, and he said it was 'his last will and testament; I then asked, do you want Mr. Barse and

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myself to witness the will in your presence and in the presence of us, and he said he did; I told Mr. Barse I had signed my name before he came; Mr. Barse signed." Repeating the conversation, he further testified, "I asked if he wanted Mr. Barse to witness his will, he said he did; then I asked him if that was his last will and testament, and he said it was; and then I asked him if it was his signature, and he said it was, or if he wrote it, and he said he did; I asked him if he wanted Mr. Barse and me to witness the will in his presence and he said he did. * * * When the old gentleman signed the will he was sitting up in bed; he asked to be helped; asked Mr. Ware; I had hold of his hand when he wrote; I guided his hand; he was trembling; my fingers were on his wrist; he asked me to do it; the will was read to him fifteen or twenty minutes before the signing; he said it was all right; he said he was glad he had signed it; he was glad it was all over now; * * * Mr. Ware held him up; stood by the side of the bed with his arms around his back; I think he used his left arm; the will that time was lying on a book; I held the book by either the right or left arm; * * * I had hold of his wrist, back of the bone of his thumb. I steadied his hand."

Mr. Barse, the other attesting witness, testified, substantially, as follows:

"Q. Mr. Eysaman didn't tell you this was his last will and testament? A. No, sir. Q. And he didn't ask you to sign it as a witness? A. Not in words. Q. Did Mr. Eysaman ask you to sign his will at all, as a witness, in words? A. No, sir. Q. Did Mr. Eysaman say to you at all that he had signed this will? A. No, sir. Q. Did he acknowledge to you in words that it was his signature to the will, or did he say in words to you that it was his signature to the will? A. No, sir. Q. Did you hear any conversation at all that you can now recollect — any conversation or words used by Mr. Eysaman on that occasion that you can now recollect? A. No, sir. * * * Q. You saw no other sign of attention than by the nodding of the head? A. No, sir. Q. Did he nod his head more than

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once? A. I don't know. Q. You have no impression about any nodding of the head more than once? A. No, sir; I think he nodded his head; no other movement that I recollect, by turning his head or opening his eyes; I think he did utter my name 'Irve'; don't recollect any other words; when Dr. Sharer spoke I do not recollect any movement of the face or head; I think he made movement of his head as if giving attention; nothing more than nodding."

Another witness, who attended the testator during the day and night of Sunday, states that he entered the room in the morning directly after Dr. Sharer left, and that he asked the testator "how he felt this morning," and he made no reply; "he was in a drowse when I went in, lying right upon his back; I think his eyes were shut." Sunday, towards evening, Dr. Sharer came there with Mr. Petrie; Dr. Sharer spoke to the old gentleman; he asked him if he knew Mr. Petrie; Mr. Eysaman made no reply to it. "Q. Anything else said to him during that afternoon or evening, that you heard or saw by anyone? A. I don't remember anything; Mr. Eysaman, most of that afternoon, was in a drowse; he would wake up once in a while from his sleep and go right in a drowse again; I did not hear him say anything at all that day; * * * during Sunday I did not hear him say anything to anybody; I don't know whether he saw anything or not, of course; he did not move his head to notice anybody; there was a person come up to the bed and he took no notice of them. I think he did not, by any act or word, indicate that he realized any person that was present. I noticed his breathing heavily all along for a number of days; from the time I was there with him; Sunday night he did not say a word or make a motion to call for anything himself; his condition, Monday, was the same, except he was a little weaker; I didn't hear him talk any on Monday; from that time to the time he died he made no reply when I spoke to him; more than a mere nod of the head; what I asked him was, if he wanted some water or something to wet his mouth; I occasionally asked him if he wanted a drink or something of that kind; I got no reply, not a word from that time on

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Sunday ; I did not hear him say anything that you could understand ; he died Thursday at three o'clock ; from Sunday to that time I don't remember that he had any conversation."

The evidence of a number of experts was given on the part of the contestants, to the effect that the signature of the will was not in the handwriting of the testator, but was apparently that of Sharer, and the surrogate, in his opinion, states that "the appearance of his signature to the alleged will, I think indicates that he was aided in its formation." An examination of the will which was presented to the court on the argument, considered in connection with the evidence of the experts, shows that the capital letters in the signature bore a resemblance to the character of Sharer's handwriting, and did not conform to the manner in which the testator usually formed such letters. Some discrepancies also appeared in the evidence of Sharer, and several witnesses testified to declarations made by him which were more or less inconsistent with his testimony on the trial. It seems to us, upon the whole evidence, to be indisputable that the testator was, at the time of the execution of the will, in the borderland between consciousness and insensibility. Although we have not alluded to all of the circumstances bearing upon the issue tried, we have endeavored to present its salient features with a view of showing the bearing which the evidence of Ware had upon the question presented. The probate of the will was affirmed at General Term upon the ground, among others, that the evidence of Ware, even if erroneously admitted, did not necessarily prejudice the contestants. We are unable to concur in the opinion of the majority of that court upon this question, and think that upon the evidence a serious question of fact was presented to the surrogate, as to the existence of testamentary capacity on the part of the testator on Sunday morning when the will was executed, and whether there was a conscious and intelligent understanding by him of the circumstances attending its execution. It cannot properly be said that material evidence erroneously admitted upon an issue is harmless, unless the testimony preponderates so greatly in favor of the proposition that

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a verdict against it would be set aside by the court as contrary to the evidence. When the evidence on each side is so nearly balanced that a determination either way would not be reversed upon appeal, it cannot be said that the losing party is not prejudiced by material evidence testified to by an incompetent witness against his objection. We think the testimony in this case, excluding that of Ware, was so nearly balanced that a decree in favor of either party could not properly have been reversed upon the facts by an appellate tribunal.

Under these circumstances Ware, who was the principal devisee under the will and had been in the testator's employ for upwards of forty years and his constant attendant during his last sickness, was called as a witness in support of the will. He was permitted to testify to his observations of the acts, conduct and conversations of the testator during the last week of the testator's sickness. This evidence was uniformly objected to, except in one instance, by the contestants, upon the specific ground that Ware, as a legatee under the will, was not competent to testify to personal communications and transactions with the testator, under section 829 of the Code. These objections were uniformly overruled by the surrogate, and Ware gave abundant evidence upon the subject of the testator's mental and physical condition during the last week of his life. Among other things, he was permitted to testify, under objection, to a conversation occurring between himself and the testator, on Saturday, the twenty-sixth of April, in relation to the subject of an offer by the testator to execute a deed of a certain one hundred acres of land to the witness, which was declined by him. The conceded error in admitting this evidence was disregarded by the General Term, upon the ground that the objection thereto was not sufficiently specific. The objection immediately succeeded eight previous objections to similar evidence, made upon the ground that the witness was not competent to testify to such transactions and conversations, and that it was "incompetent and immaterial." We think the admission of this evidence

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was error, and that the trial court was sufficiently apprised of the real nature of the objection by the whole course of the examination of the witness. (*Church v. Howard*, 79 N. Y. 415.) This witness was further permitted to testify to his observations of the testator's acts, conduct and conversations during the four days succeeding the Saturday in question. Excluding, for the present, his evidence on the subject of the execution of the will, he testified, under objection, to eleven different conversations had by the testator with various persons, indicating capacity to converse intelligently and understandingly upon the subject introduced; a recognition of the various persons who visited him; appreciation and intelligent answers to all questions put to him; a consciousness of his physical wants and the ability, in language, to make them known; and, generally, to a sufficient degree of consciousness, intelligence and judgment to show that when he executed his will he did so with full knowledge and appreciation of the nature and effect of the transaction in which he was engaged.

It is quite impossible to say that this evidence did not have a powerful effect upon the determination of the question of testamentary capacity presented to the surrogate for decision. This evidence was offered and received as bearing upon the condition of the body and mind of the testator, without reference to the particular signification of the language used by him, and was important only as showing the mental capacity of the testator and whether he had an intelligent understanding and appreciation of what took place within his sight and hearing at the time of the execution of the will. The issue in the case was whether the testator was conscious and of sound disposing mind on the Sunday in question, and Ware's evidence consisted of his observations of the acts, conduct and conversations of the testator as exhibited to those who were attending him. Such evidence was important and material upon the issue tried and is clearly within the letter and spirit of those transactions to which the Code prohibits an interested witness from testifying. It was of the same class of evidence as that pronounced by this court to be

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incompetent under section 829 of the Code in *Holcomb v. Holcomb* (95 N. Y. 316); *Lane v. Lane* (Id. 494); *In re Smith* (Id. 516).

As indicated by the head-note of *Holcomb v. Holcomb*, it was there held that "the policy of the statute excludes testimony of an interested witness concerning any transaction with the deceased in which the witness in any manner participated, or of any communication in his presence or hearing, if he, in any way was a party thereto," and that testimony of interested witnesses was improperly received "as to conduct and actions of the deceased, tending to show his enfeebled and dependent condition, and as to statements made by him although not addressed to the witness, and made in ignorance of his presence."

The case of *Cary v. White* (59 N. Y. 336) is not an authority for the admission of this evidence. Several grounds for the conclusion reached in that case were stated, but a single judge only concurred with the opinion; two judges concurred in the result and two dissented, the remaining judge not voting. One of the grounds suggested in that case was that the party objecting to the evidence offered, was not an assignee of the deceased person within the meaning of the statute. The evidence there sought to be given consisted of a declaration made by the deceased person to his own attorney in the presence of the plaintiff. The point was presented upon an objection to the question calling for the evidence which was sustained by the trial court. The judge who wrote in this court was of the opinion that the question excluded did not necessarily relate to a personal communication or transaction between the deceased person and the witness, and was, therefore, competent. The case cannot be considered an authority upon the question here presented.

Ware was also permitted to testify, under objection, to the conversation taking place between the testator and Sharer and Barse attending the attestation and publication of the will. His evidence tended, in every material respect, to corroborate

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the version given of the transaction by Sharer, and conflicted with that of Barse. At the time this evidence was admitted it appeared that Ware had been present during the whole interview, during which the will was alleged to have been executed, and had, confessedly, taken a part in its subscription by the testator. Ware and Sharer were the only persons then present, and Ware supported the testator upon the bed in his arms by the testator's express request, while Sharer guided the hand, upon similar request, and assisted Eysaman in subscribing his name to the will. It cannot be doubted that the request to Ware, and acquiescence and participation in the act of the testator in subscribing the will, was a personal transaction and communication between him and the testator within the meaning of the statute. Such must have been the understanding of the proponents, for they voluntarily omitted to examine Ware in chief as to the signing of the will, but confined his evidence to the publication and attestation which followed the testator's subscription. This was claimed by them to be competent as relating to another transaction in which he took no part.

We think it was error to admit this evidence. The act of executing the will, although consisting of several incidents, constituted but one transaction, and derived its efficacy as a valid execution from the performance of each requirement of the statute. The transaction was continuing and related to but one subject, viz., the execution of a will. A participation by a person in any of the material acts required to complete its valid execution made the transaction one between the testator and that person. Ware was present from the subscription to the publication and attestation, and it cannot reasonably be held that he did not participate in the execution of the will.

We are referred by the respondents to section 2541 of the Code of Civil Procedure, providing that "a person is not disqualified or excused from testifying *respecting the execution of a will* by a provision therein, whether it is beneficial to him or otherwise," as bearing upon the question of the competency of the evidence given by Ware. No argument or

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discussion accompanied this reference, and we are left to conjecture what bearing it is supposed to have upon the facts of the case. We infer that it is thought to have effected, to some extent, a repeal of section 829 by implication, and some of my brethren are of the opinion that the point is sufficiently grave to require serious treatment. The section occurs in that part of the Code relating exclusively to proceedings in Surrogates' Courts, and states, in respect to a single subject, that a person shall not, by reason of an interest under a will, whether beneficial or otherwise, be disqualified from testifying to its execution. We think this section was intended to be restricted to subscribing witnesses alone.

The persons whose testimony is competent, and, by statute, indispensable to the probate of a will, are its subscribing witnesses, and they are, according to general understanding, the persons who are known as witnesses to its execution. To hold, therefore, that the section refers only to those persons who are generally understood to be the witnesses to a will, would accord with its language, and, we think, also with its obvious meaning and intent. Repeals by implication are not favored by the courts and will not be allowed, unless there is such a repugnance between two statutes that they cannot stand together and one necessarily nullifies the other. If such a construction, however, can be given to them that both may stand and each have an appropriate office to perform, then it is the duty of the court to so interpret them. We think that section 2544 refers to subscribing witnesses alone, and was intended to make all such witnesses competent to testify in a probate court to its execution, however their interest might arise. Although the express words do not so confine it, we think such a purpose can fairly be implied from its language and that of statutes *in pari materia*. It is said in the note to the section, in Throop's edition of the Code of Civil Procedure, that it was substituted for section 6, and a part of section 50 of part 2, chapter 6, title 1 of the Revised Statutes. Those sections were, substantially, as follows: Section 6 provided that a creditor being a subscribing witness whose debt is by the will

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made a charge upon lands devised, should, notwithstanding such interest, be a competent witness to prove the will. Section 50 provided that: "If any person shall be a subscribing witness to the execution of any will, wherein any beneficial devise, legacy, interest, or appointment of any real or personal estate shall be made to such witness, and such will cannot be proved without the testimony of such witness, the said devise, legacy, interest or appointment shall be void so far only as concerns such witness, or any claiming under him; and such person shall be a competent witness, and compellable to testify respecting the execution of the said will in like manner as if no such devise or bequest had been made." Section 51, referring to the same subject, provided that, in case such witness would have been entitled, as heir or next of kin, to a share in the estate of such testator if he had died intestate, that he might recover from the devisees and legatees in the will, if established, his proportion of such estate, not exceeding, however, the amount devised to him by the will. Section 6 of the Revised Statutes was expressly repealed by chapter 245 of the Laws of 1880, and thereby rendered all interested witnesses, save those mentioned in section 50, which was expressly excepted from the repeal, incompetent to testify as subscribing witnesses. Section 2544 was, therefore, adopted as a substitute for section 6, and was intended to enlarge the former exception and embrace not only the special case provided for by the repealed section, but all other possible cases where an interest in the event of a controversy over the probate of a will, might, under the existing statute, disqualify a subscribing witness from testifying to its execution. Although it may not be easy to specify such cases the legislature, probably out of abundant caution, deemed it prudent by general words to embrace all subscribing witnesses by a comprehensive exception from disqualification by reason of interest. The language of the enactment seems to support this view. The evidence authorized to be given by section 2544 refers to that given in Surrogates' Courts alone, and relates solely to the subject of the execution of the will. It was clearly intended

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to operate as a substitute for prior statutes that related to subscribing witnesses alone, and there was no reason for including other persons in its provisions. The reason for exempting such witnesses from the application of the general rule of exclusion, made by section 829 is obvious, as their testimony is made indispensable, if obtainable, to the probate of a will. (§§ 2618, 2619.) Otherwise numerous wills to which legatees and others interested, who had, through ignorance, carelessness or inadvertence become attesting witnesses, would fail in their probate and the wishes of their makers in respect to the disposition of their property be altogether defeated. To obviate these consequences the provisions of the various statutes referred to were adopted. To carry the effect of section 2544 beyond the object alluded to would make interested witnesses competent to testify to facts no more essential to the establishment of wills than many other transactions respecting which they are obviously, under section 829, incompetent now to testify. Such witnesses are now incompetent to speak of personal communications and transactions with a testator, showing undue influence or testamentary capacity, and why should it be deemed important to make them competent to prove the execution of a will, which is generally supposed to be effectively taken care of by the subscribing witnesses, and yet deprive them of competency upon other equally important facts in such a controversy. It might also be asked why legatees who are subscribing witnesses should be compelled to forfeit their legacies if called to prove a will, and that those who are also legatees but not such witnesses, can testify to the same facts with perfect immunity from loss by reason thereof? And it may further be asked why such person should be permitted to testify to the execution of wills before a surrogate and yet be precluded from doing so in controversies in other courts concerning the validity of testamentary dispositions? It is quite apparent that section 2544 has not been supposed by either the bench or the bar of the state, to have produced any change in section 829; for during the nine years since its adoption, it has not been cited or referred to in

any case that we have discovered, where section 829 has been the subject of consideration. In the meanwhile numerous decisions have been erroneously made in the courts of the state if section 2544 is now given the effect claimed for it. We refer to a few only of the cases which have been decided in this court.

In *Lane v. Lane* (95 N. Y. 494), the evidence of the testator's wife, who was a legatee under the will, was admitted to prove the conversations taking place at its preparation and execution. This court said, "as to any personal transaction or communication with the testator, she was, of course, incompetent to testify under section 829 of the Code," and the judgment was reversed for error in the admission of her evidence.

In the same volume (p. 516) in the *Matter of the Probate of the Will of Smith*, a legatee and executor of the will was permitted to testify to the instructions of the testator and the draft and execution of a will on September tenth, with a view of showing that a subsequent will, executed on September thirteenth, was a transcript of the previous will and in all respects the same, except that the witness was a subscribing witness to the first will and not to the last. It was held that such witness was not competent to testify under section 829.

In the *Matter of the Will of Wilson* (103 N. Y. 374) an executor and legatee under the will of Wilson was allowed to testify to facts relating to the preparation and execution of the will. It was held that the witness, having previously executed a release of his legacy to the executor, was thereby rendered competent, although, otherwise, he would have been incompetent under section 829.

In *Loder v. Whelpley* (111 N. Y. 239), it was stated that, "the testimony of a legatee under a will, so far as it relates to communications with the testator, or transactions with him, is inadmissible on proceedings taken for the admission of the will to probate under Code of Civil Procedure (§ 829)." It may also be observed that Ware's evidence was not offered for the purpose of proving the execution of the will, for the surrogate had already ruled that the formal proofs of execu-

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tion were sufficient to admit the will to probate, and it was, therefore, received upon the question of testamentary capacity, and was, unquestionably, important evidence upon that issue. As we have seen, his evidence upon that question, if derived from personal transactions and communications with the testator, was incompetent, and, upon such an issue, it was none the less so because it related to observations made during the proceedings for the publication of the will.

The history of sections 828 and 829 shows a uniform, consistent and intelligent purpose on the part of the legislature, while abolishing the strict rules of the common law in relation to testimony given by interested persons, to so limit and restrict such evidence as not to permit them to speak of personal transactions and communications had with a deceased person through whom the respective parties to the litigation derived the title or interest which was its subject. The general principle that interest in the event of an action should not disqualify a person from testifying therein was incorporated in section 398 of the original Code of Procedure adopted in 1848. It was thereby provided that "no person offered as a witness shall be excluded by reason of his interest in the event of the action." By section 399, however, it was provided that the previous section should not apply to a party to the action, nor to any person for whose immediate benefit it should be prosecuted or defended; neither should an assignor of a thing in action or contract be examined in behalf of a person deriving title through or from him against an assignee or an executor or administrator, unless the other party to such contract or thing in action should be living.

By an amendment to the Code, in 1857, the restriction as to parties to an action and persons for whose immediate benefit it was prosecuted or defended was removed in cases where the adverse party was living and was capable of being examined as to the same transaction. Under these provisions it had been held that they did not apply to special proceedings or probate cases. (*In re Belt*, 1 Park. Crim. Rep. 169; *Woodruff v. Coa*, 2 Brad. Surrogate Rep. 223.) But by

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section 12, chapter 459 of the Laws of 1860, it was provided that sections 398 and 399 should apply to Surrogates' Courts, and that the interested parties thereby made competent should not testify to personal transactions had with a deceased person under certain circumstances therein specified. By section 31, chapter 460, Laws of 1862, sections 398 and 399 of the Code of Procedure were not only again made applicable to Surrogates' Courts, but such parties as were thereby made competent as witnesses were prohibited from testifying to personal transactions or communications with a deceased person as against the executors, administrators, heirs-at-law, next of kin or assignees of such deceased person. Since 1862, therefore, through all of the mutations which sections 398 and 399 have undergone, until they became, in 1877, sections 828 and 829 of the present Code of Civil Procedure, the prohibition upon interested parties, in actions as well as surrogates' proceedings, from testifying to personal communications and transactions with a testator, have been carefully re-enacted and preserved. It can hardly be supposed that these sections which have been the subject of frequent consideration and amendment by the legislature, and of the fullest and most careful scrutiny and consideration by the courts, should have been intended to be amended in so important a particular as that contended for, without any reference to it in the section, or some provision making it applicable to other than probate cases involving the validity of wills, and where the want of such evidence might be conclusive of the controversy. Indeed, we do not see why the same rule of construction would not require us to hold that section 399 of the original Code operated to repeal section 50 of the Revised Statutes, for certainly that section prohibited all interested persons from testifying to personal communications and transactions with a deceased person; and the general language of that section would apply as well to subscribing witnesses as to persons not in that situation; yet it was never, we think, supposed to have that effect, and section 50 still remains as an existing provision of law prescribing the conditions upon

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which legatees and others who are attesting witnesses, shall testify in respect to the execution of wills. It seems to us it could not have been intended that these legatees should be compelled to forfeit their legacies to render them competent to testify to the execution of a will, while others who were equally interested could testify to it without losing their interests thereunder.

We are, for the reasons stated, of the opinion that the judgment of the General Term and decree of the surrogate should be reversed, and the proceedings remanded for the further action of the surrogate therein, with the question of costs reserved for the determination of the court below, upon the final disposition of the case.

All concur except EARL, J., who takes no part.

Judgment accordingly.

ANDREW T. HUYCK, as Administrator, etc., Respondent, v.
THOMAS M. ANDREWS, Appellant.

The existence of an easement authorizing another to dam up and use the waters of a stream upon lands conveyed, is a breach of a covenant against incumbrances, and knowledge on the part of the grantee at the time of the conveyance or notice to him of the existence of the easement is no defense to an action for the breach.

It seems that any easement, except that of a public highway, is a breach of such a covenant; it protects the grantee against every other adverse right, interest or dominion over the land, and he may rely upon it for his security.

There is no distinction in this respect between incumbrances which affect the title and those simply affecting the physical condition of the land.

Kutz v. McCune (22 Wis. 628); *Memmert v. McKeen* (112 Penn. 815) disapproved.

In an action to recover damages for the breach of such a covenant, it appeared that B. owned an easement in a stream upon the land conveyed, *i. e.*, the right to erect and maintain a dam across it and to use all of its waters and to extend the dam then existing. At the time of the conveyance there was a dam across the stream which had been maintained for many years, and the waters were used to furnish power to a mill upon

113	81
116	505
116	508

113	81
120	465

113	81
133	346

113	81
172	158

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B.'s adjoining land. *Held*, that the grantee, although knowing of the existence of the mill and dam, was not charged with knowledge that B. had a paramount right to the exclusive use of the waters or a right to extend his dam.

Defendant alleged in his answer a mistake and asked to have the deed reformed by making the conveyance subject to B.'s easement. *Held*, that evidence of the value of the dam in connection with the mill was incompetent, either upon this issue or the question of damages; that the proper measure of damages was the difference between the value of the land without and with the easement.

(Argued January 28, 1889· decided March 12, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made the first Tuesday of May, 1886, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

The nature of the action and the material facts are stated in the opinion.

Nathaniel C. Moak for appellant. Facts of public notoriety relating to the subject of a contract must be presumed to have been known to the parties at the time of the making of the contract. (*Woodruff v. Woodruff*, 52 N. Y. 53; *Reynolds v. C. Ins. Co.*, 47 id. 597; *Gallagher v. Boden*, 4 East. Rep. 144, 147; *Memmert v. McKeen*, 112 Penn. St. 315, 316, 320; *Cathcart v. Bowman*, 5 id. 317; *Funke v. Voneida*, 11 S. & R. 109; *Patterson v. Arthurs*, 9 Watts, 152; *Wilson v. Cochran*, 48 Penn. St. 107; *Kutz v. McCune*, 22 Wis. 628.) An easement obviously and notoriously affecting the physical condition of land at the time of its sale is not embraced in a general covenant against incumbrances. (*Kutz v. McCune*, 22 Wis. 628; *Smith v. Hughes*, 50 id. 621; *Witbeck v. Corler*, 15 Johns. 482; *Jackson v. Hathaway*, Id. 447; *Haldam v. Sweet*, 55 Mich. 200.) It was error in the court to strike out the testimony of defendant's witness, Amos D. Briggs, that the value of this dam and water privilege, in connection with his mill, was \$10,000. (*Scattergood v. Wood*, 79 N. Y. 263; *Holten v. Holten*, 5 W'kly. Dig. 14; *Weiting*

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v. *Scherer*, 8 id. 392; *Wood v. Ins. Co.*, 6 Bos. 229; *Putzel v. Van Brunt*, 40 Super. Ct. Rep. 501, 509; *Reynolds v. Com. Ins. Co.*, 47 N. Y. 606; *Clark v. N. Y. L. Ins. Co.*, 64 id. 38, 39; *Hasbrook v. Paddock*, 1 Barb. 635; *Pitney v. G. F. Ins. Co.*, 61 id. 340; *Springsteen v. Samson*, 32 N. Y. 707; *Stephenhorst v. Wolf*, 35 Super. Ct. 25; *Knapp v. Warner*, 57 N. Y. 668; *Coyne v. Weaver*, 84 id. 386; *Briggs v. Smith*, 20 Barb. 419; *Burns v. City of Schenectady*, 24 Hun, 10; *Merrit v. Seaman*, 6 N. Y. 168; *Fountain v. Petter*, 38 id. 184; *Williams v. Sargent*, 46 id. 481; *Mulqueen v. Duffy*, 6 Hun, 229; *Hubbard v. Russell*, 24 Barb. 409; *Jackson v. Cadwell*, 1 Cow. 622; *Cayuga Co. Bk. v. Worden*, 6 N. Y. 745; *Jackson v. Hobby*, 20 Johns. 363; *Elwood v. Diefendorf*, 5 Barb. 398, 406; *Whiteside v. Jackson*, 1 Wend. 418.)

Eugene Burlingame for respondent. "Physical conditions," amounting to an incumbrance upon real estate, or knowledge on the part of the purchaser of their existence, will not defeat a right of action on covenants against them in a deed conveying the property. (Rawle on Covenants [5th ed.] 102, § 82; *Kellogg v. Ingersoll*, 2 Mass. 101; 2 Greenl. on Ev. § 242; *Schrivver v. Smith*, 100 N. Y. 471; *Shattuck v. Lamb*, 65 id. 500; *Mohr v. Parmalee*, 43 Super. Ct. [J. & S.] 320; *Giles v. Dugro*, 1 Duer, 331; *Jerald v. Elly*, 51 Iowa, 321; *Beach v. Miller*, 51 Ill. 202; *Barlow v. McKinley*, 24 Iowa, 70; *Kostendader v. Pierce*, 37 id. 645; *Jerald v. Elley*, 45 id. 322; *Butt v. Riffe*, 78 Ky. 352; *Burke v. Hill*, 48 Ind. 52; *Kellogg v. Malin*, 50 Mo. 496; 62 id. 429; *Prescott v. Truman*, 4 id. 627; *Hubbard v. Norton*, 10 Conn. 422; *Haynes v. Young*, 36 Me. 561; *Lamb v. Danforth*, 59 id. 324; *Pritchard v. Atkinson*, 3 N. H. 335; *Herrick v. Moore*, 19 Me. 313; *Butler v. Gale*, 27 Vt. 739; *Parish v. Whitney*, 3 Gray, 516; *Harlow v. Thomas*, 15 Pick. 66; *Giles v. Dugro*, 1 Duer, 331; *Morgan v. Smith*, 11 Ill. 194, 199; *Ginn v. Hancock*, 31 Me. 42; *Michel v. Warner*, 5 Conn. 497; *Clark v. Conroe*, 38 Vt. 469; 2 Devlin on

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Deeds, § 910; Dart's Law of Vendors and Purchasers [6th ed.] 886.)

EARL, J. In March, 1880, the defendant conveyed to Maria W. Huyck, plaintiff's intestate, by what is commonly known as a full covenant deed, certain land situate in the town of Coeymans, in the county of Albany, which, as described in the deed, contained the whole of Hawneycroix creek within its boundaries. Prior thereto Amos Briggs had received a deed of adjoining land on the east side of the creek, which conveyed to him with the land an easement, as follows: "The right to the use of the whole of the water of the said Hawneycroix kill or creek; also the right to erect and maintain a dam across said creek, and to connect same to the opposite bank thereof, at such place as the dam now is, and to extend the same, by an embankment or otherwise, from the bank at the water's edge to the high bank or hill west thereof, and the right also, from time to time, to go on to and upon the land on the opposite side of said creek, for the purpose of erecting and maintaining said dam or dams, and of using thereof the land for that purpose."

Upon the land thus conveyed to Briggs there was a paper mill, and there had been erected a dam across the creek to the westerly side thereof; and he and those under whom he held had used the waters of the creek for the purposes of that mill for many years. Subsequently to the conveyance to Mrs. Huyck, Briggs entered upon the land and built an embankment westerly from the edge of the creek to the high bank upon her land. Afterward she brought this action for the breach of the covenants contained in her deed by the existence and use of the easement which Briggs had in the land conveyed to her. She recovered, and the defendant has appealed to reverse her judgment. He claims that the easement owned by Briggs was open, visible and well known to Mrs. Huyck at the time she took her deed, and that, therefore, the covenants in the deed do not protect her against it. It is true that she knew that the paper mill and dam across the

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creek were there, and that the waters of the creek had been used for many years for the purposes of the mill. But it does not appear that she knew the full extent of Briggs' easement, or that she had any knowledge whatever that he had any paramount right to the exclusive use of the waters of the creek or to maintain his dam where it was located as high as he wished. But even if she had such knowledge, that fact furnished no defense to this action.

The deed entitled her to a perfect title to all the land which it purported to convey, free from any incumbrance thereon, and it is no defense to her action that at the time she took it she knew of some incumbrance or some defect in the title. Proof of such knowledge would be quite important in an action brought by her grantor to reform the deed, but as a defense to an action upon the covenants contained in the deed, it is of no importance whatever. That the covenant against incumbrances is broken by an outstanding easement of any kind is perfectly well established by the authorities in this state, and there is no hint in any of them that knowledge by the grantee of the existence of the easement at the time of the conveyance makes any difference. An easement is an interest in land created by grant or agreement, express or implied, which confers a right upon the owner thereof to some profit, benefit, dominion or lawful use out of or over the estate of another. An incumbrance, within the terms of the covenant against incumbrances, is said to be "every right to or interest in the land, to the diminution of the value of the land, but consistent with the passage of the fee by the conveyance" (*Prescott v. Trueman*, 4 Mass. 627); and the breach of such a covenant takes place at the instant the conveyance is made.

There is in this state one exception to the rule that the existence of an easement constitutes a breach of the covenant against incumbrances, and that is in the case of a highway. It was held in *Whitbeck v. Cook* (15 Johns. 483), that it is not a breach of the covenants that the grantor was lawful owner of the land, was well seized, and had full power to convey that

part of the land was a public highway, and was used as such; and that decision has ever since been regarded as the law in this state. It was based upon the peculiar nature of highway easements and the general understanding with reference to them. SPENCER, J., writing the opinion, said: "It must strike the mind with surprise that a person who purchases a farm, through which a public road runs at the time of purchase, and had so run long before, who must be presumed to have known of the existence of the road, and who chooses to have it included in his purchase, shall turn around on his grantor and complain that the general covenants in the deed have been broken, by the existence of what he saw when he purchased, and what must have enhanced the value of the farm. It is hazarding little to say that such an attempt is unjust and inequitable and contrary to the universal understanding of both vendors and purchasers. If it could succeed, a flood-gate of litigation would be opened and for many years to come this kind of action would abound. These are serious considerations, and this court ought, if it can consistently with law, to check the attempt in the bud." These reasons are not applicable to other easements, and the rule of that case has not been applied to any other. While there was not in the deed there under consideration any covenant against incumbrances, yet the *ratio decidendi* is equally applicable to such a covenant; and since that decision it has always been understood in this state that such a covenant is not broken by the existence of a highway.

In *McMullin v. Woolley* (2 Lans. 394), it was held that the right to take water by means of a pipe laid beneath the ground from a spring on the premises conveyed, constituted a breach of the covenant against incumbrances. In *Roberts v. Levy* (3 Abb. Pr. [N. S.] 311), it was held that a covenant entered into between owners of adjoining city lots, for themselves and all claiming under them, to the effect that all buildings erected upon the lots should be set back a specified distance from the street on which the lots fronted, constituted an incumbrance upon the lots to which it applied; and if sub-

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sequently conveyed by deed containing the usual covenant against incumbrances, a breach of the latter covenant arises the instant the deed is executed. In *Rea v. Minkler* (5 Lana. 196), it was held that the existence and use of a private right of way over the granted premises was a breach of warranty; and *Blake v. Everett* (1 Allen, 248), *Russ v. Steel* (10 Vt. 310) and *Wetherbee v. Bennett* (2 Allen, 428) are to the same effect. In *Scriver v. Smith* (100 N. Y. 471), where the owner of land upon a stream conveyed the same with a covenant of quiet enjoyment, and subsequently an owner below, under and by virtue of a paramount right, raised the height of a dam upon his land and thereby flooded the land conveyed, it was held that there was substantially an eviction and a breach of the covenant. In *Mitchell v. Warner* (5 Conn. 497), it was held that a pre-existing right in a third person to take water from the land conveyed is a breach of a covenant against incumbrances. In *Morgan v. Smith* (11 Ill. 194), it was held that an easement authorizing one to dam up and use the water of a branch running over the land conveyed, and to use the water of a spring upon it, is a breach of the covenant against incumbrances. In *Meller v. Hiatt* (8 Ind. 171) there was a conveyance of land, with covenants against incumbrances, through which there was a stream of water, and at the time of the conveyance there was across the creek, a short distance below the land conveyed, a dam which backed the stream up so as to overflow a large quantity thereof. The action was brought upon promissory notes given for the purchase-price of the land. The defense set up was breach of covenant against incumbrances. To this defense the plaintiff replied, *inter alia*, that the defendant, when he purchased the land, knew of the existence of the dam and of the right to flow back the water; and to this reply the defendant demurred. The demurrer was overruled, and upon appeal the judgment upon the demurrer was reversed. The court said: "It is conceded that the action of the court in overruling the demurrer raises the main question in the case, and in support of that ruling it is insisted that, as

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the appellant received a deed for the lands with full notice of the dam, and the right to continue it, the law presumes that he took the conveyance subject to the incumbrance. The rule of decision on this subject, as evinced by various authorities, is, to some extent, unsettled. None of the authorities, however, sustain the position that mere notice to the vendee at the time he receives his deed, of an existing incumbrance, excludes it from the operation of an express covenant against incumbrances. * * * The plaintiffs reply contains nothing from which a contract relative to the easement can be inferred. It is true the defendant knew of the incumbrance, but mere notice of it does not indicate even an intent to relinquish any remedy he might have under the covenants in his deed." In *Hovey v. Newton* (7 Pick. 29), the action was covenant upon a lease of water-works and buildings, with the whole control of the water in the pond, except the right which one Bangs had to take water in logs to his garden, and a similar right reserved to the lessor; and the court held that parol evidence was not admissible to prove that, in the intention of the parties to the lease, there was likewise an exception of the right which the county of Worcester had exercised for more than twenty years, of occasionally diverting part of the water for the purpose of cleansing the county gaol, and which diversion was well known to the parties at the time of making the lease. In *Mohr v. Parmelee* (11 J. & S. 320), a party-wall was wholly on one of two contiguous lots of land, yet subject to appropriation and use for all the purposes of a party-wall by the proprietor of the other by reason of a prior grant, and it was held that it constituted an incumbrance upon the land on which it stood; that when a title is incumbered by such an easement a right of action immediately accrues, and that whether the covenantee had or had not knowledge or notice of its existence is immaterial, both as regards his right of action and the question of damages. In 2 Greenleaf on Evidence (§ 242) it is said: "A public highway over the land, a claim of dower, a private right of way, a lien by judgment or by mortgage or any other outstanding, elder and better

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title is an incumbrance, the existence of which is a breach of this covenant. In these and the like cases it is the existence of the incumbrance which constitutes the right of action, irrespective of any knowledge on the part of the grantee or of any eviction of him." In 2 Dart on Vendors and Purchasers (6th ed. 886), the following language is used: "Although the fact of the purchaser having notice of the defect cannot prevent the covenants for title from extending to it, since extrinsic evidence is inadmissible for the purpose of construing a deed, yet in an action to rectify the covenant that fact can be used as the basis of an inference that it could not have been the intention of the parties that the covenant should include a defect of which both parties were aware." To the same effect are the following authorities: *Beach v. Miller* (51 Ill. 207); *Barlow v. McKinley* (24 Iowa, 70); *Gerald v. Elly* (45 id. 322); *Butt v. Riffe* (78 Ky. 352); *Burk v. Hill* (48 Ind. 52); *Kellogg v. Malin* (50 Mo. 496).

In *Mott v. Palmer* (1 N. Y. 564), the action was to recover damages for breach of the covenant of seisin because the grantor did not at the time of the conveyance own certain fence rails constituting part of a fence, and BRONSON, J., writing one of the opinions, said: "That parol evidence was inadmissible to control the legal effect and operation of the deed is too plain a proposition to be disputed. If the plaintiff had been told at the time that Brown owned the rails, and more, if the rails had been expressly excepted by parol from the operation of the grant and covenant, it would have been no answer to the action. A deed cannot be contradicted in its legal effect any more than it can in its terms."

To support the contention of the appellant, his counsel has placed much reliance upon the cases of *Kutz v. McCune* (22 Wis. 628) and *Memmert v. McKeen* (112 Penn. St. 315). In *Kutz v. McCune* it was held that an easement obviously and notoriously affecting the physical condition of the land at the time of its sale, is not embraced in the general covenant against incumbrances. In *Memmert v. McKeen* it was

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held that incumbrances are of two kinds — first, such as affect the title ; and, second, such as affect only the physical condition of the property ; that where incumbrances of the former class exist, the covenant is broken the instant it is made, and it is of no importance that the grantee had notice of them when he took the title ; that where, however, there is a servitude imposed upon the land which is visible to the eye, and which affects, not the title, but the physical condition of the property, it is presumed that the grantee took the property in contemplation of such condition and with reference thereto. We do not yield assent to these authorities. They have no sanction in any of the cases decided in this state, and have no adequate foundation in principle or reason. They open to litigation, upon parol evidence in every action for the breach of the covenant against incumbrances caused by the existence of an easement, the question whether the grantee knew of its existence ; and in every such case the protection of written covenants can be absolutely taken away by disputed oral evidence. We think the safer rule is to hold that the covenants in a deed protect the grantee against every adverse right, interest or dominion over the land, and that he may rely upon them for his security. If open, visible and notorious easements are to be excepted from the operation of covenants, it should be the duty of the grantor to except them, and the burden should not be cast upon the grantee to show that he was not aware of them. The security of titles demands that a grant made without fraud or mutual mistake shall bind the grantor according to its written terms. It should not be incumbent upon the grantee to take special and particular covenants against visible and apparent defects in the title, or incumbrances upon the land ; but it should be incumbent upon the grantor, if he does not intend to covenant against such defects and incumbrances, to except them from the operation of his covenants. The distinction which is attempted to be made between incumbrances which affect the title and those which affect merely the physical condition of the land conveyed is quite illusory and unsatisfactory. Easements

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not only affect the physical condition of the land, but they affect and impair the title. The owners of them have an interest in and dominion over the servient tenement, which frequently may largely impair its usefulness and value. The rule contended for would operate very unjustly and would be quite difficult to administer in many cases. In this case, while the grantee knew of the existence of the dam and of some use of the water, she did not know of the right to extend the dam from the edge of the water to her high land on the west side of the creek, nor did she know of the right Briggs had to use the entire water of the stream.

We are, therefore, of opinion that Mrs. Huyck was entitled to the protection of the covenant against incumbrances.

The defendant alleged in his answer that there was a mutual mistake, in that his conveyance was not made subject to the easement owned by Briggs; and, by way of counter-claim, he prayed relief that the deed be reformed. The issue thus tendered was tried and found against him. Upon the trial he called Briggs as a witness, and he was asked this question: "What is the fair value of your dam in connection with your mill?" This was objected to by the plaintiff as no measure of damages in the suit, and the objection was overruled. The witness answered: "It is worth \$10,000, the dam and water privilege." Then plaintiff's counsel moved to strike out the answer "as incompetent and not a proper basis of damages," and the motion was denied. Defendant's counsel then stated that his "object in offering the evidence was to show that if this dam and stream were worth \$10,000, the defendant was a fool, and plaintiff was a knave in paying \$4,000 for this water privilege, together with fifteen acres of land." The judge then granted the motion, and the testimony was stricken out, and defendant's counsel excepted. It is now claimed that this evidence was improperly stricken out. Both parties were permitted to give evidence as to the value of the easement in connection with the land conveyed, and the rule for estimating plaintiff's damages, adopted by both parties, was the difference between the value of the

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land without the easement and its value with the easement as an incumbrance thereon, and there was but little variation in the estimates of the witnesses. It was shown by competent evidence that if the deed to Mrs. Huyck had conveyed a perfect title to all the land described, without the easement, it would have been worth \$4,000, and with the easement, \$800 less. That evidence was pertinent both on the question of plaintiff's damages and upon the issue for the reformation of the deed. The consideration mentioned in the deed is \$4,000, and hence it appeared that the plaintiff paid for the premises what they were worth, free from the incumbrance of the easement, and that circumstance was entitled to some weight upon the issue for the reformation of the deed. But what the dam and the water might be worth in connection with an expensive mill on the other side of the creek could have no bearing upon that issue. They might be worth \$10,000 to Mr. Briggs, depending upon the value of his mill and the business connected therewith, that is, rather than have his mill and business destroyed he might be willing to pay that sum; but what he might be willing to pay under such circumstances would be no criterion of the real value of the easement. So far as that value has any bearing upon that issue the evidence stricken out would have been delusive, and might have been misleading. It was certainly too remote.

We are, therefore, of opinion that the judgment should be affirmed, with costs.

All concur, except PECKHAM, J., not sitting.

Judgment affirmed.

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JOHN JACOB ASTOR et al., Respondents, v. THE ARCADE RAILWAY COMPANY, Appellant.

The act of 1868 (Chap. 842, Laws of 1868), entitled "An act to provide for the transmission of letters, packages and merchandise in the cities of New York and Brooklyn * * * by means of pneumatic tubes to be constructed beneath the surface," etc., is not violative of the provision of the state Constitution (art. 3, § 16), prohibiting the passage of any local or private bill embracing more than one subject, and requiring that to be expressed in the title.

The provision in the act authorizing the formation of a corporation for the purpose of carrying out its objects and purposes in the manner specified in the general manufacturing act, clothing it with the powers and privileges conferred and subjecting it to the duties and obligations imposed by said act, so far as not inconsistent with the provisions of said act of 1868, is a matter fairly embraced within the title, and a corporation so formed is an appropriate instrumentality to accomplish the declared purposes.

A corporation so formed is a manufacturing corporation with powers limited to the accomplishment of the purposes so declared.

The words "pneumatic tubes," as used in the said act, mean simply tubes for the transmission of parcels, operated by atmospheric pressure applied within the tubes.

Such tubes are in no sense railways, and the act confers no railroad powers upon a corporation organized as provided therein, and a declaration of the object of the incorporation, contained in a certificate executed and filed for the purposes of such an organization, could give to the corporation no greater powers than those conferred by the act itself.

The act of 1873 (Chap. 185, Laws of 1873), declared in its title to be "supplemental to and amendatory of" said act of 1868, the title to which is quoted, with the addition of the words "and to provide for the transportation of passengers in said tubes" is violative of said constitutional provision, as it authorizes the construction of underground railways by the corporation organized under the original act, with authority, upon obtaining the requisite consents, to propel its cars by steam or any other motive power, and thus to transform itself into a railroad corporation.

To comply with said constitutional requirement the title must be such at least as to fairly suggest or give a clue to the subject dealt with in the act. The said act of 1873 being thus unconstitutional and void, all subsequent legislation based upon it, *i. e.*, the acts of 1874, 1881 and 1886 (Chap. 508, Laws of 1874; chap. 454, Laws of 1881; chap. 812, Laws of 1886), fall with it.

The said act of 1886 is also violative of the constitutional provision (art. 3, § 18), forbidding the passage of a private or local bill granting to any

113	98
121	541
113	98
128	54
129	332

113	98
129	513

113	98
144	409

118	98
165	278

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corporation "the right to lay down railroad tracks," except upon the conditions specified, or granting to a private corporation "any exclusive privilege, immunity or franchise whatever."

These prohibitions may not be evaded under the pretense of an amendment of the charter of a corporation organized before the adoption of said constitutional provision, or a regulation of the exercise of powers and franchises possessed by it.

In re G. E. R. Co. (70 N. Y. 361) distinguished.

(Argued February 6, 1889; decided March 12, 1889.)

APPEAL from an interlocutory judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 18, 1888, which reversed a judgment of Special Term sustaining a demurrer to the complaint herein and dismissing said complaint, and which overruled said demurrer. (Reported below, 48 Hun, 562.)

This action was brought by plaintiffs, who are the owners of property fronting upon Broadway and Madison avenue, in the city of New York, to restrain the construction by defendant of a railway under the surface of said streets, which the complaint alleged defendant was about to attempt to do, claiming authority under the act (Chap. 312, Laws of 1886), which act the complaint alleged to be unconstitutional and void.

Edward B. Thomas and *Delos McCurdy* for appellant. The title of act of 1868 (Chap. 842), correctly expresses the subject of that act. (*People v. Lawrence*, 41 N. Y. 137; *State v. Town of Union*, 33 N. J. L. 350; *Hammond v. Lesseps*, 31 La. Ann. 337; *Stewart v. Kinsella*, 14 Minn. 524; *People v. Briggs*, 50 N. Y. 553; *Sun Co. v. N. Y.*, 8 id. 241; *People v. Hulbert*, 24 Mich. 55; *Parlinson v. State*, 14 Md. 184; *Brewster v. Syracuse*, 19 N. Y. 116; *In re Orphan Home*, 92 id. 116, 120.) The title of the act of 1873 (chap. 185) expressed the subject of that act. (*People v. N. Y. C. & H. R. R. Co.*, 28 Hun, 553; *In re Knaust*, 101 N. Y. 188; *Walker v. Caldwell*, 4 La. Ann. 297; *Johnson v. Higgins*, 3 Metc. [Ky.] 566; *Tuttle v. Strout*, 7 Minn. 465; *Simpson v. Bailey*, 3 Oreg. 515; *Pelham v. Woolsey*, 16 Fed. Rep. 418; *In re New York, etc., Bridge*, 72 N. Y. 533; *People v. Whitlock, etc.*, 92 id.

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197; *People v. Briggs*, 50 id. 562; 19 id. 116; 8 id. 252; 50 id. 506, 507; *In re Dept. Public Parks*, 86 id. 440; *Snipe v. Shriner*, 44 N. J. L. 208; Pomeroy's Note, Sedg. on Stat. & Const. Law [2d ed.] 520; *People v. Brooklyn, etc., Co.*, 89 N. Y. 92; *In re Sackett, etc., Streets*, 74 id. 103; *In re N. Y. E. R. R. Co.*, 70 id. 338.) The acts of 1873 and 1874 conferred an immediate franchise to transport passengers and property by means of a railway, and although the defendant did not observe the terms of those statutes as to time, yet the Constitution did not affect the statutes, nor the power of the legislature to waive the default. (Endlich on Interpretation of Statutes, § 178; *People v. Terry*, 108 N. Y. 1; *Julius v. Bishop of Oxford*, 5 App. Cas. 223; *Rogan v. Walker*, 1 Wis. 562; *Schulenberg v. Harriman*, 21 Wall. 60; *Leavenworth v. U. S.*, 92 U. S. 741; *Taylor v. Mason*, 9 Wheat. 343; Wood's Railway Law, 25; *Conaughty v. Saratoga County Bank*, 92 N. Y. 401; *Uline v. N. Y. C. & H. R. R. Co.*, 101 id. 106; *Story v. N. Y. El. R. R. Co.*, 90 id. 123; *Shim v. Roberts*, 20 N. J. L. 444; *Findlay v. King*, 3 Peters, 375, 376, 377; 2 Atk. 18; Cases T. T. 164, 166; 2 P. Wms. 626; 2 Pow. on Dev. 257; 1 Salk. 170; 2 id. 570; 4 Mod. 68; 2 Black. 154; *Doe v. Considine*, 6 Wall. 458, 472; *Livingstone v. Livingstone*, 52 N. Y. 118; *Blanchard v. Morey*, 56 Vt. 170; *Leaver v. Gauss*, 62 Iowa, 314; *Craig v. Wells*, 11 N. Y. 320, 321; *Nicoll v. N. Y., etc., R. R. Co.*, 12 N. Y. 121; *C. & C. R. R. Co. v. White*, 14 S. C. 51-63; *Duryee v. Mayor, etc.*, 96 N. Y. 493; *Howard v. Turner*, 6 Greenl. 106; *In re Kings Co. El. R. R. Co.*, 105 N. Y. 97; Morawetz on Corp. §§ 31, 1023; *S., etc., Co. v. Thacher*, 11 N. Y. 107; *Minor v. Mechanics' Bk.*, 1 Pet. 46; *S. & A. R. R. Co. v. Ezell*, 14 S. C. 281; *Hammond v. Straus*, 53 Md. 1; *Mitchell v. R. R. R. Co.*, 17 Ga. 574.) The principles underlying the relations of the corporation to the state preclude a grant on condition precedent. (*Stuyvesant v. Davis*, 9 Paige, 431; 6 Bar. & Cres. 519; *Parmalee v. Oswego & Syracuse R. R. Co.*, 6 N. Y. 80; *Beach v. Nixon*, 9 id. 35; 2 Black. 153; *C. L. Ins. Co. v.*

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Needles, 113 U. S. 580; 2 *Waterman on Corp.* 820; *People v. K., etc., Co.*, 23 Wend. 205; *Schulenberg v. Harriman*, 21 Wall. 60; *United States v. Repentigny*, 5 id. 267; *People v. B., etc., Co.*, 28 Wend. 234, 235; *King v. Pasmore*, 3 T. R. 241; *Morawetz on Corp.* § 1029.) In case of default the state may exercise the reserved power, or compel an observance of the terms of the charter, as it elects. (*Pratt v. N. Y., etc., Co.*, 55 N. Y. 511; *Ludlow v. N. Y., etc.*, 12 Barb. 440; *Clark v. Jones*, 1 Denio, 517; *Canfield v. Westcott*, 5 Cow. 270; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 85; Taylor on Priv. Corp. [2d ed.] 451; *People v. Albany & Vt. R. R. Co.*, 24 N. Y. 261-269; *Hathaway v. Payn*, 34 id. 109; *Julius v. Bishop of Oxford*, 5 App. Cas. 223; Endlich on Inter. Stat. § 312; *Messenger, etc., v. P. R. R. Co.*, 36 N. J. L. 413; *Buncombe Co. Comrs. v. Tommey*, 115 U. S. 128; *People v. N. Y. C. & H. R. R. Co.*, 28 Hun, 549; *Sinking Fund Cases*, 99 U. S. 721.) As the acts required were all to be done subsequent to the vesting of the franchise, their non-performance could only be enforced by the state, and the defendant's status could not be questioned by these plaintiffs. (*Nicoll v. N. Y. & E. R. R. Co.*, 12 N. Y. 121; *Schulenberg v. Harriman*, 21 Wall. 60; *Duryee v. Mayor, etc.*, 96 N. Y. 493.) The legislature could waive the default whether the franchise vested or was contingent, and the Constitution had no effect upon the charter. (*People v. Brooklyn, F. & C. I. R. Co.*, 89 N. Y. 85; *In re Gilbert El. R. Co.*, 70 id. 361; *Trustees v. Woodward*, 4 Wheat. 692.) A general law may not limit, extend or vary the provisions of a special act, unless such intent is clearly manifest. (*Matter of President, etc., of Del. & Hud. C. Co.*, 69 N. Y. 209; *Matter of Comrs. of Central Park*, 50 id. 493; *Bennett, etc., v. Peck*, 28 Hun, 447; *Village of Gloversville v. Howell*, 70 N. Y. 287; *People v. Quigg*, 59 id. 83; *Baird v. Mayor, etc.*, 96 id. 567; *State v. Stoll*, 17 Wall. 436; Endlich on Inter. Stat. §§ 200, 209.) The law abhors a forfeiture. (*People v. President, etc.*, 9 Wend. 380.) It should, therefore, be avoided if possible, and as the various consequences attending the duties prescribed by the

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statutes discussed are penalties, they should not be enlarged by construction. (*State v. Baltimore, etc.*, 3 How. [U. S.] 545, 546; *Strong v. Stebbins*, 5 Cow. 210; *Myers v. Foster*, 6 id. 569.)

Charles P. Daly for appellant. The corporate franchise was not lost by the failure of the company to begin and complete the road within the time limited. (Angel & Ames on Corp. § 774; Taylor's Law of Priv. Corp. 457; Potter's Law of Corp. 704; Morawetz on Priv. Corp. § 1004; Green's Brice's Ultra Vires, C., 5; *People v. Manhattan Co.*, 9 Wend. 382; *King v. Armory*, 2 Term Rep. 566, 567; *Mickels v. Rochester City Bk.*, 11 Paige, 118; *Tower v. Hale*, 46 Barb. 365; *Adam v. Beach*, 6 Hill, 373; *Davis v. Gray*, 16 Wall. [U. S.] 220, 222, 223; *Schulenberg v. Harriman*, 21 U. S. 64, 65; *B. S. T. Co. v. City of Brooklyn*, 78 N. Y. 25, 524; *In re B. W. & C. R. R. Co.*, 75 id. 335; 72 id. 246; *Farnsworth v. Minn. & Co. R. R. Co.*, 92 U. S. 66, 67; *United States v. Repentigney*, 5 Wall. [U. S.] 211; *Finch v. Risley*, Popham's Rep. 53.) The legislature, where a franchise is subject to forfeiture may waive it, and it does so by enlarging the time within which the condition may be performed, or by subsequent legislative acts recognizing the continued existence of the corporation. (*People v. Manhattan Co.*, 9 Wend. 351; *People v. F. P. R. Co.*, 27 Barb. 451, 452; Taylor's Law of Priv. Corp. § 460; Morawetz on Priv. Corp. § 655.) The act extending the time for the completion of the road is not within the meaning of the provisions of the amended Constitution, a private or local bill granting the right to lay down railroad tracks, or authorizing the construction or operation of a street railroad. (*In re N. Y. E. R. R. Co.*, 70 N. Y. 338; *In re Gilbert El. R. R. Co.*, Id. 368; 9 Hun, 303; *People v. Petrea*, 92 N. Y. 140.) In respect to constitutional law, a doubtful construction is not sufficient, every presumption is in favor of constitutionality, and it is only in cases of clear departure from the fundamental law that any act of the legislature can be held to be unconstitutional.

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Needles, 113 U. S. 580; 2 *Waterman on Corp.* 820; *People v. K., etc., Co.*, 23 Wend. 205; *Schulenberg v. Harriman*, 21 Wall. 60; *United States v. Repentigny*, 5 id. 267; *People v. B., etc., Co.*, 28 Wend. 234, 235; *King v. Pasmore*, 3 T. R. 241; *Morawetz on Corp.* § 1029.) In case of default the state may exercise the reserved power, or compel an observance of the terms of the charter, as it elects. (*Pratt v. N. Y., etc. Co.*, 55 N. Y. 511; *Ludlow v. N. Y., etc.*, 12 Barb. 440; *Clark v. Jones*, 1 Denio, 517; *Canfield v. Westcott*, 5 Cow. 27; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 85; *Tay on Priv. Corp.* [2d ed.] 451; *People v. Albany & Vt. R. Co.*, 24 N. Y. 261-269; *Hathaway v. Payn*, 34 id. 1; *Julius v. Bishop of Oxford*, 5 App. Cas. 223; *Endlich Inter. Stat.* § 312; *Messenger, etc., v. P. R. R. Co.*, 36 N. J. 413; *Buncombe Co. Comrs. v. Tommey*, 115 U. S. 1; *People v. N. Y. C. & H. R. R. Co.*, 28 Hun, 549; *Sin Fund Cases*, 99 U. S. 721.) As the acts required were to be done subsequent to the vesting of the franchise, their performance could only be enforced by the state, and defendant's status could not be questioned by these plaintiffs. (*Nicoll v. N. Y. & E. R. R. Co.*, 12 N. Y. 121; *Schulenberg v. Harriman*, 21 Wall. 60; *Duryee v. Mayor, etc.*, 96 id. 493.) The legislature could waive the default whether the franchise vested or was contingent, and the Constitution had no effect upon the charter. (*People v. Brooklyn, F. & M. R. Co.*, 89 N. Y. 85; *In re Gilbert El. R. Co.*, 70 id. 1; *Trustees v. Woodward*, 4 Wheat. 692.) A general law could not limit, extend or vary the provisions of a special act, and such intent is clearly manifest. (*Matter of President Del. & Hud. C. Co.*, 69 N. Y. 209; *Matter of City of New York v. Central Park*, 50 id. 493; *Bennett, etc., v. Peck*, 447; *Village of Gloversville v. Howell*, 70 N. Y. 287; *Quigg*, 59 id. 83; *Baird v. Mayor, etc.*, 96 id. 567; *Stoll*, 17 Wall. 436; *Endlich on Inter. Stat.* §§ 200, 201; *law abhors a forfeiture.* (*People v. President, etc.*, 380.) It should, therefore, be avoided if possible, and the various consequences attending the duties prescribed

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(*Warner v. Beers*, 23 Wend. 166; *People v. Alberson*, 55 N. Y. 54, 55; *In re G. & El. R. R. Co.*, 70 id. 367, 368; *People v. Supervisor of Orange*, 17 id. 241.)

James C. Carter for appellant. Every presumption is in favor of the constitutionality of legislative acts. (*In re N. Y. El. R. R. Co.*, 70 N. Y. 327.) Conditions, whether precedent or subsequent, should attach to the estate granted, and to the whole of that estate. (1 Greenl. Cruise on Conditions, 469; *People ex rel. Crimmins v. McManus*, 34 Barb. 620; *Foot v. Stiles*, 57 N. Y. 399.) Conditions are not favored by the law, and hence they must be clearly expressed. (*Craig v. Wells*, 11 N. Y. 315, 320.) So far as the legislative requirements are conditions, they are conditions subsequent, and breaches of them have no direct effect to destroy the estate or right dependent upon them, although such breaches may be made the subject of an action to annul the franchise. (*In re N. Y. El. R. R. Co.*, 70 N. Y. 327.)

Noah Davis and *Henry H. Man* for respondents. The act of 1866 was both private and local. (*People v. O'Brien*, 38 N. Y. 103; *People v. Suprs.*, 43 id. 10; *People v. McConville*, 35 id. 449, 451; *Mayor, etc., v. Colgate*, 2 Kern. 146; *People v. Hill*, 35 N. Y. 452; *C. & A. R. R. Co. v. M. L., etc., Co.*, At. Rep. 523.) The act of 1868 created a corporation within the definition of the Constitution (§ 3 of art. 8), and of the Revised Statutes (2 R. S. [Banks' 7th ed.] 153). (*Thomas v. Dakin*, 22 Wend. 9; *Warner v. Beers*, 23 id. 103; *Curtis v. Leavitt*, 15 N. Y. 1-55.) It was necessary that the corporation should duly organize and commence business within one year after the passage of the act, no other time being prescribed by the act. (2 R. S. [Banks' 7th ed.] 153, § 7; 3 Barb. Ch. 237; 30 Barb. 26; 44 id. 631; *In re B. W. & M. R. Co.*, 72 N. Y. 245; 78 id. 524; 79 id. 454.) All the legislation which treats the organization under the sixth section of the act of 1868 as valid, and builds the subsequent railroad schemes upon it, must fall with that unconstitutional provision. (*In re B. W., etc., R. R. Co.*, 75 N. Y. 335, 339.)

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The legislature, under the reserved right of the Constitution to alter, amend or repeal the charters of corporations, has no power to compel corporations created for one purpose to become corporations for a different purpose under pain of forfeiture of their charters. (*Pierce on R. R. Corp.* 459; *White v. S. & U. R. R. Co.*, 14 Barb. 559, 560; *Shield v. Ohio*, 95 U. S. 319, 324; *N. Y. C. Co. v. Mayor, etc.*, 104 N. Y. 1, 38.) A statute declaring that a railroad corporation and its functions shall cease by failure to comply with some requirements, executes itself, and there is no need of any action of state authorities. (*In re B. W. & N. R. R. Co.*, 75 N. Y. 335; 72 id. 245; *B. S. T. Co. v. Brooklyn*, 78 id. 524.) When a legislature proffers new powers to an existing corporation having well defined powers, even though they be in the line of its original authority, unless the act be so framed as to make itself a part of the charter or to impose the powers as imperative obligations, the option of the corporation may be exercised to accept or reject them, and this is done by complying or neglecting to comply with the conditions precedent, if any are contained in the act. (*Johnson v. H. R. R. R. Co.*, 49 N. Y. 455; *Clarkson v. H. R. R. R. Co.*, 12 id. 304; *P. & G. F. P. Co.*, 102 Penn. St. 123; 1 Wood's Railway Law, 87, 88, 102 and note 1.) The act of 1881 was nothing more nor less than an attempt to grant new powers by reviving dead powers, or powers which could not under any then existing law be exercised or used, and was, therefore, equivalent to, and was, creating such powers by new enactment. (*In re B. W. & E. R. R. Co.*, 75 N. Y. 335; 72 id. 245; 78 id. 524, 531; *Crocker v. Crane*, 21 Wend. 211; *Gray v. Farwell*, 81 N. Y. 600.) The act of 1886 is a private and local bill and is wholly void, under the provisions of the State Constitution. (Const. art. 3, § 18; *People v. O'Brien*, 38 N. Y. 193; *People v. Suprs.*, 43 id. 10; *In re El. R. R. Co.*, 70 id. 327, 349, 350; *Matter of B. W. & N. R. R. Co.*, 72 id. 335; 75 id. 335, 339; *Matter of B. S. T. Co.*, 78 id. 524.) For the purpose of availing themselves of the constitutional question above considered, it is not essential that the plaintiffs shall own a fee

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in Broadway and Madison avenue, or in their vaults. It is enough that they are owners of property bounded on the public streets. (Const. art. 3, § 18.) Plaintiffs are not obliged to stand alone on their rights as abutting property owners. They have vested rights of property in the street, and in the vaults in front of their respective lots, which they may possess and defend against all comers until lawfully taken by constitutional enactments and proceedings. (*Lahr v. Met. El. R. Co.*, 104 N. Y. 268, 290; *Story v. N. Y. El. R. Co.*, 90 id. 122; *In re El. R. Co.*, 70 id. 327; *In re Gilbert El. R. Co.*, Id. 361; *In re El. R. Co.*, 38 Hun, 438, 460; *Milhan v. Sharp*, 27 N. Y. 611, 624; *Story Case*, 90 id. 161; *Goodtitle v. Alker*, 1 Burroughs, 143; *McCarthy v. City of Syracuse*, 46 id. 199; 3 Kent's Com. [12th ed.] 573; *Robert v. Sadler*, 104 N. Y. 229; *Ely v. Campbell*, 33 How. Pr. 277.)

John F. Dillon for respondents. Public grants of franchises, and especially corporate grants of this character, must be construed strictly; and any fair doubt upon the whole enactment, as to the nature or extent of the grant, is to be resolved against the grantee or company. (*Charles River Bridge Case*, 11 Pet. 420, 545; *Cayuga Bridge Co. v. Magee*, 2 Paige, 116; 6 Wend. 85; *Sharp v. Speir*, 4 Hill, 76; *Mayor, etc., v. B. & S. A. R. R. Co.*, 97 N. Y. 275; *N. Y. C. Co. v. Mayor, etc.*, 104 id. 1, 38.) The defendant had no existence or powers as a railway corporation *quoad* Broadway and Madison avenue when the act of 1866 was passed; and that act being a local and private act, passed after and subject to the constitutional amendment, "could not legislate it into life" or confer such powers upon it. (*In re B., W., etc., R. R. Co.*, 75 N. Y. 335, 339.) The right to enter upon the streets of a city and lay down railroad tracks is also a franchise, since it can only come from legislative grant, and is entirely distinct from the franchise to be or to exist as a corporation. (*N. Y. D. Co. Case*, 107 N. Y. 54.) The statutory requirements are conditions precedent to the acquisition by the defendant of any right to lay down railroad tracks. (*Olney v. Pearce*,

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1 R. I. 292; *Riddle v. Bedford Co.*, 7 S. & R. [Pa.] 392; *N. Y. C. Co. Case*, 104 N. Y. 1, 23.) The provisions as to capital stock are conditions precedent to acquiring the right to lay down railroad tracks. (Morawetz on Corp. § 781; *Barry v. Morgan*, 1 Sandf. Ch. 305, 306; Lindley on Partnership, 612, 626; *Crocker v. Crane*, 21 Wend. 211, 218; *Gray v. Farwell*, 81 N. Y. 600; *U. Ins. Co. v. Hoge*, 21 How. [U. S.] 35, 63; Brice's *Ultra Vires* [Am. ed.] 153; *Minor v. Bk. of Alexandria*, 1 Pet. 46; *S., etc., P. R. Co. v. Thatcher*, 11 N. Y. 102; *El. R. Cases*, 70 id. 327; 90 id. 122; *In re Gilbert El. R. Co.*, 70 id. 361; *In re B., W. & N. R. Co.*, 72 id. 245; 75 id. 335; 81 id. 69; *Trask v. McGuire*, 18 Wall. 391; *St. Louis, etc., Co. v. Berry*, 114 U. S. 465, 475; *Memphis, etc., Co. v. Comrs.*, 112 id. 609; *In re B., etc., R. Co.*, 75 N. Y. 335; *N. Y. Dist. Ry. Case*, 107 id. 42.)

Joseph S. Auerbach for respondents. The New York Arcade Railway Company, if it ever became clothed with railway powers, became subject to the duties and liabilities of the general railroad act of 1850. (Laws of 1850, chap. 140, § 47; Laws of 1867, chap. 775; *Kerr v. Dougherty*, 79 N. Y. 327.) Section 47 of the general railroad law, as amended, is an express limitation upon original grant of corporate power, and failure to comply with its provisions works *ipso facto* an absolute forfeiture. (*In re B. & W. R. R. Co.*, 72 N. Y. 245; 81 id. 76; 75 id. 335; *B. T. Co. v. City of Brooklyn*, 78 id. 524.) The provisions of section 47 of the general railroad act, as amended, and the provisions of the act of 1874, must, if possible, be read and construed together. (*B. S. T. Co. v. City of Brooklyn*, 78 N. Y. 531.) Repeal of any statute by implication is not favored by our courts. (*Stranahan v. S. V. R. R. Co.*, 84 N. Y. 312; *People ex rel. Kingsland v. Palmer*, 52 id. 83; *Dr. Foster's Case*, 11 Co. 63; *Weston's Case*, Dyer, 347; 10 Mod. 118; Bac. Abr. Statute [D], Dwarria, 673-675; *Hayes v. Symonds*, 9 Barb. 260; *Marx v. New York*, 9 N. Y. 574; *Fertilizing Co. v. Hyde Park*, 97 U. S. 666; *Tenn. R. R. Co. v. Canal Comrs.*, 21

Penn. St. 22; *Langdon v. Mayor, etc.*, 93 N. Y. 129; *Mayor, etc., v. Broadway, etc., R. R. Co.*, 97 id. 281; *Ruggles v. Illinois*, 108 U. S. 526.) The conclusion that the corporate existence and powers of this defendant have ceased are in harmony with the general policy of the law and with the letter and spirit of the Constitution. (*Matter of El. R. Co.*, 70 N. Y. 349-350.) Corporate existence and rights are necessary to justify this action, and any owner feeling aggrieved may deny this corporate right. (*In re B. W. & N. R. Co.*, 72 N. Y. 249; *B. S. T. Co. v. City of Brooklyn*, 78 id. 531.)

EARL, J. The sole question for our determination is whether the defendant has legal authority to construct and operate a railway under Broadway and Madison Avenue in the city of New York. The defendant traces its corporate existence to the act chapter 842 of the Laws of 1868, entitled "An act to provide for the transmission of letters, packages and merchandise in the cities of New York and Brooklyn and across the North and East rivers by means of pneumatic tubes, to be constructed beneath the surface of the streets and public places in said cities and under the waters of said rivers." The first section of the act authorized and empowered Alfred E. Beach and other persons named, and their assigns "to lay down, construct and maintain one or more pneumatic tubes in the soil beneath the surface, squares, avenues and public places in the cities of New York and Brooklyn and under the bed of the waters of the East river between the said cities, and also under the bed of the waters of the North river from the city of New York to the shore of New Jersey, but at such depth as not to interfere with navigation; and to convey letters, parcels, packages, mails, merchandise and property in and through said tubes for compensation, by means of vehicles to be run and operated therein by the pneumatic system of propulsion; and to the end that the public convenience may be promoted in the operation of the said vehicles, the said persons and their assigns are also hereby authorized and required to erect upon the sidewalks of the said streets, squares, avenues and public places suitable

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ornamental lamp-posts, boxes, pillars or receptacles, not exceeding thirty inches in diameter, connected with said pneumatic tubes for the deposit of letters, packages and property to be transmitted therein." And it provided that the tubes should not extend through any vault, nor under any sidewalk fronting on private property, without the consent of the owners of such private property, and compensation to them, which should be ascertained and determined, in case the parties could not agree, in the manner provided by the general railroad act of 1850. Section 2 provided that the pneumatic tubes should be so constructed as to have a mean interior diameter of not exceeding fifty-four inches. Section 5 authorized the persons named in the act to hold a meeting and determine the terms and conditions upon which the powers, privileges and franchises conferred by the act might be transferred to a corporation to be organized as provided in the next section; and section 6 provided that, in case the persons attending the meeting named in the prior section should so determine, they might organize themselves into a corporation in the manner specified in the general manufacturing act of 1848, and the acts amendatory thereof, "for the purpose of constructing and maintaining the pneumatic tubes aforesaid and using and operating the same as hereinbefore authorized;" and that the corporation so organized shall "possess all the powers and privileges conferred by said acts and be subject to all the duties and obligations imposed therein, not inconsistent with the provisions of this act."

In August, 1868, in pursuance of the powers conferred by the act, the persons therein named organized themselves into a corporation by the name of "The Beach Pneumatic Transit Company;" and in the certificate executed and filed by them, they declared that the object of the corporation was "to construct and operate pneumatic railroads in the cities of New York and Brooklyn and under the waters of the North and East rivers, and to exercise all the powers, privileges and franchises conferred upon said corporation by the act" of 1868; that the capital stock should be \$5,000,000, and that

the corporation should continue in existence for the term of fifty years. The certificate could give the corporation no greater powers than were conferred by the act of 1868, and to that act we must look for the scope and measure of its powers. The act did not confer railroad powers upon the corporation, and did not subject it to any of the railroad acts, except for the purpose of ascertaining the compensation to be paid to the owners of property interests in the streets. It authorized the formation of a manufacturing corporation, with the incidents, powers and duties of such a corporation, so far as they were consistent with the purposes of the act. The corporation formed was, in fact, a manufacturing corporation, not, however, with the general power to engage in any manufacturing business, but for the sole purpose of constructing, maintaining, using and operating the pneumatic tubes. The formation of such a corporation was a matter fairly embraced within the title of the act. It was an appropriate instrumentality to accomplish the purposes of the act, and in no sense a new and independent subject. The legislature having authorized the construction and operation of the pneumatic tubes, could, in the act itself, have created the corporation, or could have authorized its organization under any of the general laws of the state adapted to the formation of any business corporation; and the formation of such a corporation would be germane to the main purpose of the act as indicated by its title. While the general manufacturing laws regulated the corporation as to its mode of existence, its manner of action and its corporate life and being generally, yet all its powers and duties related and were confined to the construction, maintenance, use and operation of the pneumatic tubes; and, therefore, section 16 of article 3 of the Constitution, which provides that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title," was not, as contended on behalf of the plaintiffs, violated.

What do the words pneumatic tubes mean? They convey

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to our minds no other meaning than that of tubes for the transmission of parcels operated by atmospheric pressure applied within the tubes. The parcels may be transmitted outside the tubes upon vehicles attached to a piston operated within the tubes by atmospheric pressure, or they may be transmitted within the tubes by atmospheric pressure applied behind them. But they are in no sense railways. Such a tube may contain vehicles placed upon wheels, and the wheels may run upon rails or in grooves, and yet the structure could not, according to the popular sense, or any legal sense, be what is generally known as a railway. The tubes may be so constructed that in a technical or scientific sense the structure might be called a railway; and so, too, any structure upon which vehicles may be moved upon rails, however peculiar or small, may in some limited sense be called a railway, and yet it may not be a railway within the meaning of the Constitution and the general laws of the state. When they speak of railways they always mean railways either for the general carriage of property, or of passengers, or of both; and a railway which may be operated in small pneumatic tubes by atmospheric pressure for the transmission of small packages is not within such meaning.

Such was the character and status of the corporation organized under the act of 1868. That act was amended by the act, chapter 512 of the Laws of 1869, entitled "An act supplementary to chapter 842 of the Laws of 1868, in relation to carrying letters, packages and merchandise by means of pneumatic tubes in New York and Brooklyn;" but there is nothing in that act pertinent to the present discussion.

From 1868 to the commencement of this action in 1886, so far as this record discloses, nothing whatever was done by the corporation except to change its name several times and to procure acts of the legislature purporting to enlarge its powers and extend its corporate life. No pneumatic tubes have been constructed, and it is a fair inference, from the admitted facts, that the system for the pneumatic transmission of property

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was before the year 1873 found to be impracticable. It had been tried in various parts of Europe, but had proved a failure, and for the general transmission of property or passengers was in the year 1873 nowhere in use. (Chambers' Encyclopedia, titles, "Atmospheric Railway" and "Pneumatic Dispatch;" Encyclopedia Britannica, title, "Atmospheric Railway;" Appleton's Cyclopedic, title, "Atmospheric Railway;" Johnson's Cyclopedic, title, "Pneumatic Transmission.")

In 1873 the persons interested in the corporation, as we may infer, being aware of its insufficiency for any practical purpose, concluded to procure an enlargement of its powers, and a radical change in its character and purposes, and, therefore, they obtained the passage of the act (Chap. 185), entitled "An act supplemental to and amendatory of chapter 842 of the Laws of 1868, an act entitled 'An act to provide for the transmission of letters, packages and merchandise in the cities of New York and Brooklyn, and across the North and East rivers by means of pneumatic tubes, to be constructed beneath the surface of the streets, squares, avenues and public places in said cities, and under the waters of said rivers,' passed June 1, 1868; and of chapter 512 of the Laws of 1869, entitled 'An act supplementary to chapter 842 of the Laws of 1868, in relation to carrying letters, packages and merchandise by means of pneumatic tubes in New York and Brooklyn, and to provide for the transportation of passengers in said tubes.'" The last phrase of this title "and to provide for the transportation of passengers in said tubes" did not appear in the title of the act of 1869, and yet in the act in all its stages through the legislature, as approved by the governor, filed in the office of the secretary of state and printed in the Session Laws, the quotation marks are so placed as to make the phrase appear to be part of that title. The title of the act, therefore, was well calculated to deceive any persons to whose attention it came while the act was under consideration in the legislature. But we will assume that this title is to have the same force and effect as if that of the act of 1869 had been properly quoted, and then the only addition to the titles of the prior

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acts is the final phrase above quoted, and the only subject expressed in the title is the transportation of property and passengers in pneumatic tubes. This title is assailed by the plaintiffs as not in compliance with section 16 of article 3 of the Constitution above quoted. A particular examination of the provisions of the act is, therefore, necessary. The first section provides that it shall be lawful for the Beach Pneumatic Transit Company "to construct, maintain and operate an underground railway for the transportation of passengers and property," under Broadway and Madison avenue, "by means of tubes of enlarged interior diameter sufficient for the construction of a railway or railways therein, and for the running of cars and the carrying of passengers therein; and also to construct, in connection with said tubes, two or more tracks of railway with the necessary turnouts and stations for the ingress and egress and accommodation of passengers, and for the receipt and discharge of packages and freight, and said company shall have the right and privilege, subject to the approval of the board of engineer commissioners hereinafter provided for, to make connection with the Harlem and connecting railroads at any point deemed best, at or above Forty-second street, and also to make connection with the Hudson River railroad at any point northerly of Fifty-ninth street." Section 2 provides that the passenger tubes shall, as far as practicable, follow the center line of the streets, and shall not occupy in the aggregate a greater space than thirty-one feet in width by eighteen feet in height, exterior measurement, and that they shall be laid and constructed under the supervision of a board of three engineer commissioners, whose duty it is to see that the "passenger tubes and railways" are constructed in a thorough and workmanlike manner; and that they shall constitute a board of commissioners, a majority of whom "shall determine whether the pneumatic system or other motive power shall be adopted by said corporation for the propulsion of the cars running within said passenger tubes." Section 4 authorizes the corporation to acquire the title to such real estate or interest therein as may be necessary to enable it to

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construct, operate and maintain "said tubes and railways," and to construct and maintain the proper platforms, stations and buildings at such points along the route of its tubes as may be convenient and suitable for the ingress and egress of its passengers, and for the receipt and discharge of freight and packages and necessary for the successful operation of "said tubes and railway and for the proper connections between said tubes and railway, platform, stations and buildings;" and in case the corporation is unable to agree with the owners of real estate for the purchase and use thereof, it is authorized to acquire the title to the same in the manner provided in the general railroad act of 1850; and in all cases the use of the streets, avenues, squares, grounds and public places, and the right of way under the same for the purpose of "said tubes and railway or railways therein," shall be considered and is declared to be a public use. Section 5 provides that "it shall be lawful for said corporation to convey passengers on said railway or railways through said tubes for hire," and regulates the rate of fare that may be charged. Section 6 provides that the corporation shall commence active operations in the construction of its works within six months after the passage of the act, and shall complete the section of passenger tubes with two railway tracks from Bowling Green to Fourteenth street within three years, and shall complete the remainder of the passenger tubes as authorized within five years thereafter. Section 7 provides that the corporation shall not construct any station, depot or other building, or work above the surface of any land belonging to the city of New York, either in its own right or as trustee, without the consent of the mayor and aldermen, but that nothing in the act shall be construed to authorize the mayor and aldermen to donate, lease or sell any portion of any of the ground surface of any public park in the city beyond what may be absolutely necessary for the exit from and entrance to the railroad. Section 9 provides that the corporation shall possess "all the powers and be subject to all the duties and liabilities imposed on railroad corporations

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by the laws of this state, not inconsistent with the charter of this company or the purposes of its incorporation.”

Here we read nothing of pneumatic tubes or of propulsion by atmospheric pressure, nor even of pneumatic railways. We read of passenger tubes; but we must not be deceived by the juggle of words. We find authorized a grand underground railway not less than fifteen miles long, with two or more tracks, turnouts, platforms, stations, buildings and other appurtenances, with power to connect with surface steam rail roads, to be operated through passage-ways called tubes, eighteen feet in height and thirty-one feet in width exterior measurements; in fact tunnels which could not be operated by atmospheric pressure. What was before a manufacturing corporation was converted into a railroad corporation, or, at least, had superadded the powers, privileges, duties and liabilities of railroad corporations under the general laws of the state, with authority, by the consent of the engineer — commissioners, to use, for the movement of its cars, horses, steam or any other motive power. The construction of such a railway by such a corporation is certainly a subject not expressed in the title of the act. The only subject there indicated is the transportation of passengers and property through pneumatic tubes by atmospheric pressure. A title purporting that an act provides for pneumatic transportation would not be sufficient for an act authorizing the construction and operation of a horse railway or a steam railway, as a title purporting that an act authorizes a line of omnibuses for the transportation of passengers would not be sufficient for an act authorizing the construction of a railway for the same purpose.

The constitutional provision referred to has been deemed by statesmen and jurists, *conditores legum*, of so much importance that it is found in the fundamental laws of most of the states. Its purpose is to prevent fraud and deception by concealment, in the body of acts, subjects not by their titles disclosed to the general public and to legislators who may rely upon them for information as to pending legislation. When the subject is expressed, all matters fairly and reasonably con-

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nected with it, and all measures which will or may facilitate its accomplishment, are proper to be incorporated in the act and are germane to the title. The title must be such, at least, as fairly to suggest or give a clue to the subject dealt with in the act, and unless it comes up to this standard it falls below the constitutional requirement. (*Mayor, etc., v. Colgate*, 12 N. Y. 146; *People v. Hills*, 35 id. 449, 452; *Matter of New York, etc., Bridge*, 72 id. 527; *Matter of Application of Department of Public Parks*, 86 id. 439; *People v. Whitlock*, 92 id. 191; *Matter of Knaust*, 101 id. 188; Cooley's Constitutional Limitations, 141.) Here the only subject suggested by the title is the transportation of passengers and property through pneumatic tubes, by atmospheric pressure, and everything appropriate and germane to that subject could be provided for in the act. But a person reading the title alone would have no clue whatever to the great railway scheme actually authorized by the act; and so the corporators themselves evidently regarded the act, for, finding that the corporation had outgrown its name, "The Beach Pneumatic Transit Company," they, by the act chapter 503 of the Laws of 1874, had it changed to the "Broadway Underground Railway Company;" and in that act what were before called "tubes" are called "tunnels;" and ten years later, by an order of the proper court, the name was again changed to the "New York Arcade Railway Company." While by the acts of 1874, chapter 454 of 1881 and chapter 312 of 1886, the charter of the corporation was amended and its powers greatly enlarged, pneumatic tubes, propulsion by atmospheric pressure and pneumatic railways are nowhere mentioned, and all that is left as a result of all the legislation is a grand scheme for underground railways operated by any motive power except such as shall emit "smoke, gas or cinders," which, if carried into effect, would, doubtless, be one of the marvels of the world. But if it is as desirable and safe as it is marvelous, it should be placed upon a constitutional basis and make an undisguised appeal upon its merits for the public sanction.

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Our conclusion, therefore, is that the act of 1873 for the insufficiency of its title is unconstitutional and void, and hence all subsequent legislation based upon that act must fall with it. When the act of 1886 was passed, under which the defendant proposes to lay down its tracks and to construct its underground railways, it had no power to construct an underground railway for the transportation of passengers and general freight through tunnels, and, therefore, that act is in conflict with section 18 of article 3 of the Constitution, which forbids the legislature to pass a private or local bill granting to any corporation the right to lay down railroad tracks or to construct a street railroad except upon conditions mentioned in that section. (*Matter of N. Y. District R. Co.*, 107 N. Y. 42.)

We need go no further. The conclusion already reached renders it unnecessary to solve the various other questions argued with much ability and learning by the able counsel who appeared before us.

The judgment should be affirmed, with costs.

GRAY, J. I concur with EARL, J., in his opinion that the act of 1873 was unconstitutional and void, in that it failed to comply with section 16 of article 3 of the Constitution. But I am further of the opinion, assuming that the act of 1873 was valid, and that there was an acceptance of and a valid compliance with its conditions, and that there was a waiver of causes of forfeiture by the passage of the act of 1886, that the latter act was in violation of the provisions of the constitutional amendment, which went into effect on January 1, 1875. By that amendment the legislature was inhibited from passing a private or local bill, granting to any corporation the right to lay down railroad tracks, or any exclusive privilege, immunity or franchise whatever. The act of 1886, under which the appellant claims to have acquired its present rights, cannot, in my view of what it grants, be upheld as legislation, which merely regulates the exercise of powers formerly granted to and possessed by an existing corporation. It went far beyond that. It was, in fact, a new grant of sub-

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stantive rights, in addition to and differing from what might have been claimed under the act of 1873. By the act of 1873 the company would have had the right to construct a railway in tubes, which should not occupy a greater space than thirty-one feet in width, by eighteen feet in height, exterior measurements. The company could not have approached within two feet of the curb line, nor within eighteen feet of the building line. These restrictions must be deemed to be important limitations and wholesome provisions, designed for the protection of the rights of the abutting property owners and to secure to the public the rightful enjoyment of the streets as such. By the act of 1886 they would possess the right to excavate for their railways a space of forty-four feet, inside measurements, in width and without any limitation as to depth. They might construct railways, without the use of tubes or tunnels, and use any motive power, which would not permit of the emission of smoke, gas or cinders.

I think we have here a pretty wide departure from the rights and powers to be enjoyed under the act of 1873. The pneumatic tube, of a diameter of fifty-four inches, for the transportation of packages and merchandise, authorized under the original charter of 1868, and which was transmuted by the act of 1873 into a tubular passenger and freight railway, has now wholly disappeared, and in its place appears a scheme for what amounts to a complete occupation of the street for railway purposes; except so far as it leaves a roof over the excavation to take the place of the street surface. This grant of a right to excavate the street, to an extent practically unlimited, and the permission to abandon tubes and to construct railways in the excavation, are matters of grant too serious in their nature and consequences, under the circumstances of the case, to be passed over as in mere regulation of an existing franchise. To allow such legislation is, in my opinion, to nullify the beneficial and protective objects aimed at by the constitutional amendment of 1875.

Under the guise of an amendment, there was a legislative grant to this company of franchises and privileges beyond

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any naturally following upon, or flowing from those granted under the act of 1873; not in harmony with the spirit of that grant, and, of necessity, exclusive in their nature. It, therefore, fell within the prohibition of the constitutional amendment. When the People have, by amending the Constitution, restricted the powers of their representatives in the legislature to pass private or local bills, which grant the right to lay down railroad tracks, or any exclusive privileges or franchises to a corporation, the courts should see to it that the constitutional limitation is not evaded, under the pretense of an amendment of the charter. They should scrutinize the legislative act complained of; not with the idea of seeking the way to a construction adverse to its constitutionality, but rather to uphold it, if possible. But if the scrutiny reveals a real and serious violation of the constitutional provisions, they must condemn the act as invalid.

It is said, however, that a scope of action is offered for the legislature, with respect to corporations already in the possession of corporate rights, acquired under statutes passed before the adoption of the constitutional amendment. As a general proposition this is true. Conceding to the legislature its full measure of authority to legislate, under the general grant of power by the Constitution of the state, we hold that such authority, when now exercised by a private bill in behalf of a corporation, cannot, under the guise of measures for the regulation of the exercise of the corporate powers and franchises, be upheld by the court, when, by a practical construction, the act permits what the amendment to the Constitution prohibits. A regulation of these powers and franchises, when the act touches them so as to alter them, means their restriction, rather than their enlargement. If enlargement of powers may be sometimes consistent with the constitutional limitations, it may not go to the extent of trenching on the territory of private and public rights, over which the Constitution was plainly intended to operate in its limitations. When enlargement of corporate powers becomes indistinguishable from a grant of new substan-

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tive rights, within the purview of the section in question, then the mischief is accomplished, to prevent which the constitutional amendment was designed.

In the Matter of the Gilbert Elevated Railway Company (70 N. Y. 361), CHURCH, Ch. J., in discussing the changes of structure, etc., made by the commissioners under the provisions of the Rapid Transit Act, said the changes were restrictive in their character. "By the charter the whole street was to be covered by the structure; by the conditions imposed only a portion of some streets could be occupied." And he says, in that connection: "I cannot accede to the proposition that any change in the structure and in the manner of occupying the streets, however restrictive upon the company, or beneficial to the public in the use of the streets, constitutes a fresh grant of the right to lay down railroad tracks. It is a misnomer to call such restrictions *grants* of any *right* whatever. As well might the cutting down of a fee to a life estate be termed a grant of land." Again he says: "No exclusive right or franchise was granted to the respondent corporation upon any construction of the clause. Every substantial right existed before the passage of the act, and the conditions imposed, embracing changes of structure and manner of occupying streets, should be regarded as restrictive of existing rights, and not *grants* of rights or franchises within the constitutional sense. * * * This series of amendments designed to restrict the powers of the legislature in matters of detail, under general phrases and undefined words, is experimental in this state. They must be sustained and applied by a rational and practical construction, so as to subserve the purposes intended, and prevent the evils designed to be remedied; but not, by an artificial and technical construction, to extend their application to cases never contemplated."

I think the meaning of the decision is clear. If the legislative act operates upon a charter in the direction of a regulation, an adjustment, or a restriction of powers possessed, it could not be objectionable. Within its reserved powers the legislature may, at all times, amend or alter the charter, but the

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constitutional amendment will not permit it by a private bill to make any new grant of rights, comprehended within those specified by the amendment. I do not think that it can be said, in the present case, that every substantial right given by the act of 1886 existed previously.

For the reasons I have briefly given, I think the act of 1886 practically gave to this corporation a right to lay down railroad tracks, which it could not have exercised under the act of 1873, and, also, gave what are practically exclusive privileges. I think it contravened the Constitution, in the letter and in the spirit, and is, therefore, void.

All concur with EARL, J.; RUGER, Ch. J., DANFORTH and PECKHAM, JJ., concur with GRAY, J.

Judgment affirmed.

JOHN H. RIKER et al., Executors, etc., Respondents, v. JOHN H. CORNWELL et al., Appellants.

A general residuary clause, not circumscribed by clear expressions in other parts of a will, includes any property or interests of the testator which are not otherwise perfectly disposed of, and all that for any reason eventually fall into the general residue.

The will of B., after various gifts to charitable societies and for specified benevolent purposes, contained a provision, by the terms of which, in case of a misnomer of any of the institutions named, or of their incapacity to take, she gave the sum constituting such ineffectual gift to her executors "to be applied to the charitable uses * * * indicated in such manner as they shall be able, giving the same, however, to them, absolutely relying on their carrying out substantially" the purposes of the testatrix. By the next clause she gave "all the rest, residue and remainder" of her estate, "including all void and lapsed legacies, if any, not carried by the terms of the preceding clause" to six charitable societies named. A codicil, after various other bequests, named fourteen societies in addition to those specified in the residuary clause, which the testatrix directed should share in her residuary estate "remaining after the payment of all the legacies and carrying out all of the trusts and provisions" equally with those so specified, the testatrix declaring it to be her intention that the twenty societies should receive in equal shares the residue of her "personal and of the proceeds of her real estate."

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Following this was a clause, by which, if any of the gifts in the codicil should from any cause fail, the testatrix gave the amount of the bequest so failing to her executors "as joint tenants, absolutely in full confidence, that they * * * will dispose of such amounts" as the testatrix would have desired herself to do. In an action for the construction of the will, *held*, that its evident purpose was to leave no part of the estate undisposed of; that in no contingency could the next of kin of the testatrix take any benefit by reason of a legacy failing to take effect; that if the executors could not take the amount of any void or lapsed legacies, the same went into the residuary estate and passed to the legatees named in the residuary provisions, which included all the property the testatrix died possessed of which was not otherwise effectually disposed of.

Springett v. Jennings (L. R., 6 Ch. App. 333); *Kerr v. Dougherty* (79 N. Y. 827) distinguished.

(Argued March 6, 1889; decided March 19, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 17, 1887, which affirmed a judgment entered on a decision of the court on trial at Special Term.

This action was brought by plaintiffs, as executors of the will of Sarah Burr, deceased, to obtain a judicial construction of said will.

The material portions of the will are set forth in the opinion.

Clifford A. H. Bartlett for appellants. The second clause of the second codicil is not a residuary clause, but is a specific bequest of residue to particular legatees; and in case it should be held that the specific legacies hereinafter attacked cannot take effect or are void, they would not fall into this clause. (*Springett v. Jennings*, L. R., 6 Ch. App. 333, 336, 337; *Wetmore v. Parker*, 52 N. Y. 464; *Mayor of Lyons v. Advocate-General of Bengal*, Eng. Law R., 1 App. Cas. 116; *Whyte v. Whyte*, Eng. Law R., 17 Eq. Cas. 57, 59; *In re Benson*, 96 N. Y. 510; *Kerr v. Dougherty*, 79 id. 346, 348, 349; *Ommaney v. Butcher*, Turn. & Russ. 260; *Wetmore v. N. Y. Inst. for the Blind*, 4 N. Y. S. R. 740; *Tracy v. Tracy*, 15 Barb. 503; *Shulter v. Johnson*, 38 id. 80; *Rowan, etc., v. Wachter*, 42 id. 43, 50; *Goddard v. Pomeroy*, 36 id. 556; *Myers v. Eddy*, 47 id. 263; *Reynolds v. Reynolds*, 16 N. Y.

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257; *Kidney v. Coussmaker*, 1 Vesey, Sr. 446; *Mirehouse v. Scaife*, 4 Mylne & Cr. 706; *Cole v. Turner*, 4 Russell's Ch. 379; *Bench v. Biles*, 4 Maddock's Ch. 188; *Lupton v. Lupton*, 2 Johns. Ch. 623; *Beekman v. Bonsor*, 23 N. Y. 298, 312; *Skrymsher v. Northcote*, 1 Swanst. 570.) The next to the last clause of the first codicil is a residuary clause into which the legacies attacked would fall in the event of its being held that they could not take effect or are void, and this clause is void as an attempt to create a trust not authorized by law. (*Foose v. Whitmore*, 82 N. Y. 407, 408; *Perry on Trusts*, § 114; *Lawrence v. Cooke*, 32 Hun, 133, 137; *Levy v. Levy*, 33 N. Y. 97; *Bascom v. Albertson*, 34 id. 584; *Lefevre v. Lefevre*, 2 T. & C. 341; *Matter of Abbott*, 3 Redf. 303; 35 Hun, 403; *Wace v. Mallard*, 21 Law Jour. [Ch.] N. S. 355; *Curnick v. Tucker*, Eng. Law R., 17 Eq. Cas. 320; *Hart v. Tribe*, 18 Beav. 215; *In re O'Hara*, 95 N. Y. 403; *Russell v. Jackson*, 10 Hare, 204; *Jones v. Bodley*, L. R., 3 Eq. 635; *Springett v. Jennings*, Id., 10 Eq. 488; *Schultz's Appeal*, 80 Penn. 396; *Sedgwick on Stat. and Const. Law*, 682; *Holmes v. Mead*, 52 N. Y. 340; *White v. Howard*, 46 id. 162, 163; *Beekman v. Bonsor*, 23 id. 311; *Fountain v. Revenel*, 17 How. [U. S.] 385, 386, 388; *Pritchard v. Thompson*, 95 N. Y. 81.) The law of New York is to govern the validity of the bequests. (*Bascom v. Albertson*, 34 N. Y. 587; *Chamberlain v. Chamberlain*, 43 id. 434; *Despard v. Churchill*, 53 id. 198; *Sherwood v. Am. Bible Soc.*, 4 Abb. Ct. App. Dec. 232; *Hollis v. Drew Theological Sem.*, 95 N. Y. 174-176.)

John E. Parsons for the executors, respondents. The appellants have no standing upon which to appeal. If either of the contested legacies were void, the amount would not go to the appellants. It would either go to the residuary legatees or pass to the executors under the personal devise to them. (1 Jarman on Wills [5th Am. ed.] 27 n; *Sherer v. Bishop*, 4 Bro. C. C. 55; *In re Benson*, 96 N. Y. 499; *Phillips v. Davies*, 92 id. 199; *Bliven v. Seymour*, 88 id. 469.) The

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devise to the executors is personal. If it is necessary to rely upon it to defeat the appellants, it of itself would deprive them of any interest in void or lapsed legacies. (*In re O'Hara*, 95 N. Y. 403, 411, 421.) Devises to executors absolutely, not coupled with a condition in the nature of a trust or contract which equity can enforce, are valid. (1 Jarman on Wills [5th Am. ed.] 686; *Meredith v. Heneage*, 1 Sim. 542; *Wood v. Cox*, 2 Mr. & Cr. 684; *Irvine v. Sullivan*, L. R., 8 Eq. 673; *Webb v. Wool*, 2 Sim. [N. S.] 267; *Foose v. Whitmore*, 82 N. Y. 405; *Colton v. Colton*, 127 U. S. 300, 307, 311, 312, 313; *Hess v. Singler*, 114 Mass. 56, 59.)

Stephen P. Nash for respondents, the Trustees of Griswold College et al. The appellants, as next of kin of Sarah Burr, deceased, are not entitled to take or receive any benefit or sum of money by reason of the alleged failure or incapacity of any persons, corporations, associations, institutions or societies to take or hold any bequests or devises made by her said will and the codicils thereto. (*Kerr v. Dougherty*, 79 N. Y. 327, 346; *Foose v. Whitmore*, 82 id. 465.)

C. E. Tracy for respondent the American Church Missionary Society. There was a clearly expressed intention to dispose of the entire estate to charities, and in case of failure of any of the dispositions, to her executors, and in that event absolutely and not upon any trust. Such provisions are valid. (*Bowker v. Watts*, 2 How. Pr. [N. S.] 150.) The gifts to the American Church Missionary Society do not create a perpetuity such as the law forbids. (*Wetmore v. Parker*, 52 N. Y. 457, 458, 460.)

Edward W. Sheldon for the New York Society for the Relief of the Ruptured and Crippled, respondent. If the residuary clause is not sufficient to include any lapsed or void legacies, the gifts to the executors would be operative. These gifts being absolute are valid. (*Willets v. Willets*, 20 Abb. N. C. 471.) The language of the residuary clause in the will is, however,

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sufficiently broad to include all lapsed or void legacies. (*In re Benson*, 96 N. Y. 510; *Kerr v. Dougherty*, 79 id. 327.)

M. M. Budlong for the New York Bible Society, respondent. The wishes and intentions of the testatrix are the supreme arbiters in the matter, unless they are in opposition to some rule or principle of law or prohibited by statutory enactment. (2 Black. Com. 379; 4 Kent's Com. 534, 535.) The effect of a codicil ratifying, confirming and republishing a will is to give the same force to the will as if it had been written, executed and published at the date of the codicil. (Redfield on Law of Wills, chap. 6, § 23 a, subd. 5; *Brimmer v. Johier*, 1 Cush. 118.) The courts are decidedly against adopting any construction of wills which would result in partial intestacy unless absolutely forced upon them. (Redfield on Wills, 442, chap. 13, § 6; *King v. Woodhull*, 3 Edw. Ch. 87; *James v. James*, 4 Paige, 116; *King v. Strong*, 9 id. 97; *Banks v. Phelan*, 4 Barb. 90.) Very special words are required to take a bequest of the residue out of the general rule. The only exception to the general rule (viz., that void and lapsed legacies fall into the residuum) is when the words used in the will expressly show an intention on the part of the testator to exclude such portions of his estate as are mentioned in any of the previous clauses of the will from falling into the general residue. (*Bland v. Lamb*, 2 Jac. & Walk. 406; *Banks v. Phelan*, 4 Barb. 80.) The general rule that all void and lapsed legacies in a will of personal property fall into the residuum, and go to the residuary legatees, does not apply where the bequest is of a residue of a residue — still, it is a question of intention, and if any intimation can be drawn from the will and codicils as to the testatrix's wishes in the matter, that must control. (2 Jarman on Wills, 368; 2 Redfield on Wills, 120; *Evans v. Field*, 8 L. J. [N. S.] 264.)

Sewell, Pierce & Sheldon for the American Home Missionary Society et al., respondents. The void or lapsed legacies pass under the residuary clause rather than to the next of kin, because such a construction will prevent intestacy as to any

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part of the estate. (2 Redf. on Wills, 116, 122; *Durour v. Motteux*, 1 Ves. 320; 2 Jarman on Wills [5th Am. ed.] 231-235; *Green v. Jackson*, 5 Russ. 35; 2 R. & My. 238; *King v. Strong*, 9 Paige, 93; *Reynolds v. Kortright*, 18 Beav. 417, 427; *James v. James*, 4 Paige, 115; *King v. Woodhull*, 3 Edw. Ch. 79; *Floyd v. Carow*, 88 N. Y. 560; *In re L'Hommedieu*, 32 Hun, 10.) So far as any intention on the part of the testatrix is concerned, the particular legatees, who are in no way related to her, might, with as equal propriety as her next of kin, claim a share in these void legacies. (1 Redf. on Wills, 433, 442; *Hoxie v. Hoxie*, 7 Paige, 192; *King v. Woodhull*, 3 Edw. Ch. 79; *Hoppock v. Tucker*, 59 N. Y. 208, 209; Wms. on Exrs. 971; 3 Pet. 346; *Given v. Hilton*, 95 U. S. 59.) The construction of a will must depend upon the intention of the testator, to be ascertained from a full view of everything contained in the four corners of the instrument. (1 Redf. on Wills, 433; *Hoxie v. Hoxie*, 7 Paige, 192.) In case one or more of these twenty residuary legatees is declared incapable of taking under the will, the share of that or those legatees will pass under the residuary clause to those remaining. (*Attorney-General v. Johnstone*, Amb. 577; 2 Ross on Leg. 1461; *Booth v. Booth*, 4 Ves. 407; *Kingsland v. Rapelye*, 3 Edw. 1; *Ferry's Appeal*, 102 Penn. St. 161; 2 Jarman on Wills, 368; *Given v. Hilton*, 95 U. S. 591; *Stehman v. Stehman*, 1 Watts [Pa.] 466; *Coleman v. Jarrow*, 35 L. T. [N. S.] 614; *Crecelius v. Horst*, 78 Mo. 566; 9 Mo. App. 51; *Jackson v. Roberts*, 14 Gray, 546; *Metcalf v. Framingham Parish*, 128 Mass. 374; 2 Story's Eq. Jur. [12th ed.] § 1074, notes *b, e*; *Page v. Gilbert*, 32 Hun, 301; *Ferrer v. Pyne*, 81 N. Y. 281, 284, 285; *Hoppock v. Tucker*, 59 id. 202; 4 Kent's Com. 534; *Floyd v. Carow*, 88 N. Y. 360.) A direction by a testator to sell for a definite purpose works a conversion. (Pom. Eq. Jur. §§ 1159-1165; *Matter of Woods*, 35 Hun, 60; *Teed v. Morton*, 60 N. Y. 506; *Fisher v. Banta*, 66 id. 468; *Dodge v. Pond*, 23 id. 69; *Given v. Hilton*, 95 U. S. 591.) The appellants cannot set up a given of the will for one purpose and deny its force for

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another, and that, too, its main purpose. (2 Jarman on Wills, 211, 221, 224; *Wright v. Trustees M. E. Ch.*, Hoffman, 202; 3 Redf. on Wills, 140, 142; Pom. Eq. Jur. §§ 1169-1174; *Sharpstein v. Tillou*, 3 Cow. 651; *Jackson v. Jansen*, 6 Johns. 73; *Hanley v. James*, 5 Paige, 318; *Bogert v. Hertell*, 4 Hill, 492; *Gourley v. Campbell*, 66 N. Y. 169; *Bective v. Hodgson*, 10 H. of L. Cas. 656.)

H. B. Clossen for Syrian, etc., College, respondent. If the legacy to the respondent were void, and it should lapse, it would go not to the next of kin, but to the twenty legatees of the residuary estate, specifically defined in the will as "including void and lapsed legacies." (*Hoppock v. Tucker*, 59 N. Y. 202; *Page v. Gilbert*, 32 Hun, 301; *Betts v. Betts*, 4 Abb. N. C. 317, 421.)

GRAY, J. The appellants ask us to reverse the judgments below, for errors in the construction by the court of the will of Sarah Burr, deceased. Their principal contention is that certain dispositions of her property, made by way of legacies for charitable and religious purposes, were invalid or ineffectual, and that such gifts neither were carried by the provisions of the will, which were made for the residuary legatees, nor vested in the persons named as executors, under certain other clauses. If they are right in their views, the result would be that, as to so much of her estate, testatrix had died intestate and the next of kin would benefit correspondingly. The testatrix died in 1882, unmarried; leaving her surviving neither child, parent, brother nor sister. Her will was made in 1866, and two codicils were subsequently executed in the years 1869 and 1881, respectively. Beyond a few legacies to relatives and friends, she disposed of her large possessions by gifts to charitable societies, or for definite benevolent purposes in this and other states and countries. By the seventh clause of the will in case of a misnomer of any of the institutions, or their incapacity to take and hold the legacies, she gives the sum constituting any ineffectual gift to her executors "to be applied

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to the charitable uses or purposes as above indicated, in such manner as they shall be able; giving the same, however, to them absolutely, relying on their carrying out substantially my purposes." By the next following, or eighth clause, she gives "all the rest, residue and remainder" of her estate, "*including all void and lapsed legacies, if any, not carried by the terms of the preceding clause,*" in equal parts, to six charitable societies named. The first codicil makes further bequests to various individuals and societies and repeats the provision contained in the seventh clause of the will, designed for the case of a legacy being ineffectually given or becoming void. The second codicil recites the fact of there being a large increase in the residuary estate of the testatrix since the making of the will and previous codicil, and "in order to carry out more widely the charitable and religious purposes intended," she makes further large bequests to a number of charitable societies. Of this last codicil the second and third clauses are important to our consideration of the questions arising, and I give them in full.

"*Second.* And I do hereby will and direct that the following named institutions, to wit: The Sheltering Arms, etc. (naming fourteen additional societies), shall share my residuary estate remaining after the payment of all the legacies and carrying out all the trusts and provisions made by me in my said will and first and second codicils (excepting the residuary bequests given in the eighth clause of my said will) in equal shares with the institutions named in the said eighth clause of my said will; and I give and bequeath the same accordingly, it being my intention that the corporations, institutions and societies, hereinabove named in this second clause, together with the six corporations, institutions and societies named in the said eighth clause of my said will, shall receive in equal shares *the residue of my personal estate and of the proceeds of my real estate.*

"*Third.* If any of the legacies or bequests given by me in this codicil should, from any cause whatever, fail to take effect, I give and bequeath the amounts of such legacies or bequests

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so failing to take effect unto my executors, who shall qualify, as joint tenants, absolutely, in full confidence that they or the survivor or survivors of them will dispose of such amounts as I would have desired myself to do.

"*Fourth.* I hereby republish my said will and first codicil as altered hereby."

The second clause of this last codicil, read in connection with the eighth clause of the will, constitutes as the sole residuary legatees of testatrix twenty societies; while, in each testamentary instrument, she endeavors to prevent a failure of disposition in a gift of a legacy, by substituting her executors as its recipients, in the place of the legatee for which the ineffectual gift was originally intended. A very plain intention is manifest, from a consideration of these testamentary provisions, that, beyond the particular gifts to the individuals and societies named, all that remained of her estate the testatrix devoted to charitable and benevolent purposes, through the instrumentality of certain selected institutions as her residuary legatees, or of her executors, where a bequest proves ineffectual. The purpose is evident to leave no part of her estate undisposed of, in any contingency. Her solicitude is unmistakable that, beyond what has been given to them, her relatives shall not share in her estate by reason of any portion of it being invalidly disposed of. With her motives, or with her reasons, we are in no wise concerned. If, in her testamentary dispositions, she has kept within the rules which should govern in the making of wills, those dispositions cannot be successfully assailed by the next of kin. The main or controlling question, therefore, which presents itself at once in this case is, whether, under the testamentary scheme revealed by these several instruments, in any contingency, the appellants, as the next of kin of the testatrix, can take any benefit by reason of a legacy failing to take effect. If they cannot, it becomes quite unimportant to discuss the many questions, which they raise with respect to the capacity of legatees to take, or to the validity of certain bequests.

At the outset, we may as well dispose of the only objection

which is made as to any of the societies named as the residuary legatees. It is objected that "The New York Society for the Relief of the Ruptured and Crippled" lacks corporate capacity to take, in that its certificate of incorporation was not acknowledged and that it was not properly indorsed by the justice of the Supreme Court. Neither ground of objection is tenable.

The proof of the certificate by a subscribing witness was a sufficient compliance with the provisions of the statute; and the indorsement of the certificate, as "approved" by the justice, was a sufficient warrant for its filing by the clerk. But even if defects existed in the proceedings for incorporation, the passage of subsequent acts by the legislature was a recognition of its incorporation and cured such defects.

Coming, then, to the consideration of the effect of the residuary clause upon the estate of the testatrix, we are unable to perceive any ambiguity in the language which the testatrix uses; or to detect any purpose to narrow that all comprehensive import which attaches to a general residuary clause in wills. A general residuary clause includes in its gift any property or interest in the will which, for any reason, eventually falls into the general residue. It will include legacies which were originally void, either because the disposition was illegal, or because, for any other reason, it was impossible that it should take effect; and it includes such legacies as may lapse by events subsequent to the making of the will. It operates to transfer to the residuary legatee such portion of his property as the testator has not perfectly disposed of. No one supposes that he has failed in his intention to dispose of all of his property by his will, and courts should endeavor to make out such an intention and to uphold the testamentary plan, so that the testator may not, as to some of his estate, have died intestate. We think, in the present case, that the testatrix has expressed herself with absolute clearness in making a general residuary disposition of her property, and that it carries with it everything which she died possessed of and which was not otherwise effectually disposed of. There is the language of the eighth clause of the original will, by which *void and lapsed legacies*

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are included in the gift of the residuary estate, and that of the second clause of the second codicil, by which the residuary legatees are to share the residuary estate "remaining after the payment of all the legacies and carrying out all the trusts and provisions made in the will and first and second codicils * * * in equal shares." Such language would seem to be comprehensive enough, and should preclude our entertaining the idea that the testatrix meant to circumscribe or to limit the residuary fund given to the societies and to confine it to so much of her estate as would be ascertained after deducting what she had previously mentioned in bequests.

A different purpose is emphasized by the concluding words of the second clause of the last codicil, which state that it is her "intention that the corporations, institutions and societies hereinabove named in this second clause, together with the six corporations, institutions and societies named in said eighth clause of her said will, shall receive in equal shares *the residue of her "personal estate and of the residue of her real estate."* The appellants argue that the words "after payment of all the legacies and carrying out all the trusts and provisions made," etc., found in the second clause of the second codicil, are words of exclusion and are indicative of an intention to give only a specific residue. We see no force in the suggestion. In ascertaining the intention of the will-maker, we should not seek it in particular words and phrases, nor confine it by technical objections. We should find that intention by construing the provisions of the will with the aid of the context and by considering what to be the entire scheme of the will. The intention, to which effect is to be given, should be one harmonizing with that scheme, where no rule of law is contravened thereby. When the testatrix explicitly declares it as her intention that her residuary legatees shall receive "the residue of her personal estate and of the proceeds of her real estate," I find no room for speculation as to intention, nor support for the proposition that the residuary legatees take a gift of a specific residue. I find a gift to them, which comprehends all of her estate, not otherwise legally disposed

of. In the English Chancery Case of *Springett v. Jennings* (Eng. Law R., 6 Ch. App. 333) cited by the appellants' counsel upon his brief, JAMES, L. J., points out a distinction between an all-comprehending gift of a residue and one which carries a particular residue.

By way of illustration he suggests: "I give all my £3 per cent to A, and all the rest of my government stocks to B, and the gift of the £3 per cents to A fails by lapse, will they go to B? It appears to me the answer must be in the negative, for it is quite clear that the rest of the government stock was not a residuary bequest which could take in the particular thing which was given by a separate description to somebody else. * * * The failure of the first gift would not be for the benefit of the person to whom the other stocks are given." And MELLISH, L. J., says, in the same case: "Now, in order that a residuary gift may * * * include lapsed and void devises, without the will expressing any intention to that effect, I am of opinion that the devise must be a 'real residuary devise; that is to say, so worded as to apply to all land that is not otherwise disposed of. When a testator has made a gift of that kind, then the act says, in substance, it will be presumed from the universality of the gift that unless he expresses the contrary, he intends it to pass what was specifically devised, if from any cause the specific devise fails.' The words upon which the appellants lay so much stress, as being words of exclusion and limitation, are used by the testatrix rather as words of description of a general residue. They might have been omitted without any prejudice to the intention. But their retention works no confusion of thought. That which is "remaining after carrying out all the trusts and provisions made by me in my will and codicils" is the fund, which is only completely ascertained, when the previous dispositions have been effectuated. The very sense of the words implies the negation of the idea of a specific or fixed residue, outside of the sum of the previous gifts in the will. If the "carrying out" of the provisions of the will and codicils is defeated to any extent, to that extent the residuary fund

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is increased by the accretion of the void or lapsed gift. I think the doctrine is firmly established, by the reported cases and by the text books, that where the residuary bequest is not circumscribed by clear expressions in the instrument and the title of the residuary legatee is not narrowed by special words of unmistakable import, he will take whatever may fall into the residue, whether by lapse, invalid dispositions or other accident. (Roper on Leg. [1st Am. ed.] 453 ; 2 Wms. on Exrs. [7th ed.] 1567 ; 2 Redf. on Wills [2d ed.] 115 ; *Bland v. Lamb*, 2 Jac. & W. 406 ; *Reynolds v. Kortright*, 18 Beav. 427 ; *James v. James*, 4 Paige, 115 ; *Van Kleeck v. R. D. Church*, 6 id. 600 ; *King v. Strong*, 9 id. 94.) In a late decision of this court in the *Matter of Benson's Accounting* (96 N. Y. 499), EARL, J., discusses the question of when lapsed legacies fall into the residue, and reviews the authorities ; and the views expressed in his opinion sustain the doctrine which I have suggested here. In *Kerr v. Dougherty* (79 N. Y. 327), which the appellants have cited, there is no opposition to that doctrine, nor is it an authority which at all militates against our conclusions here. In that case the language of the will and the facts were such as to limit and circumscribe the residuary clause and to prevent it from being added to by invalid legacies. But MILLER, J., in his opinion, uses this language, in discussing the rule as to residuary bequests, which is laid down in *King v. Woodhull* (3 Edw. Ch. 79, 82) : "It is also said, in substance, that to exclude what would fall by lapse or invalid disposition, as it may be supposed that the testator did not intend to die intestate as to any portion of his property, the law requires that he should use words limiting the gift of the residue and showing an intention to exclude such portions of his estate as may fail to pass." In *Floyd v. Carow* (88 N. Y. 560, 568), ANDREWS, J., says of a residuary devise : "The intention to include is presumed, and an intention to exclude must appear from other parts of the will."

In view of the result at which we have arrived, namely, that, under this residuary clause, the legatees would share in a residuary fund, capable of being increased by the falling in of

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what was ill given previously by the testatrix, we think it wholly unnecessary to consider the effect or validity of the gifts to the executors. In any event, the question would be one between them and the charitable societies, named as residuary legatees, and one with which these appellants are not concerned.

The judgment appealed from should be affirmed, with costs to the respondents who have appeared here, to be paid out of the estate.

All concur.

Judgment affirmed.

THOMAS ROBERTS, Appellant, v. CAROLINE D. ELY et al., as
Executors, etc., Respondents.

Plaintiff brought this action, in 1881, to recover a specific portion of certain insurance money collected by E., defendant's testator in 1872, of which portion plaintiff claimed he was the equitable owner. *Held*, that the alleged cause of action was a liability implied by law which arose when the money was received by E.; that it was subject to the six-years statute of limitations then in force (Code Pro. § 91), and so was barred.

Money in the hands of one person, to which another is equitably entitled, may be recovered by the latter in a common-law action for money had and received, subject to the restriction that the mode of trial and the relief which can be given in a legal action is adapted to the exigencies of the case and is capable of adjustment in such an action without prejudice to the interests of other parties.

No privity of contract is required to sustain such an action, except that which results from the circumstances, and it is immaterial whether defendant's original possession was rightful or wrongful.

The fact that the relation between the parties has a trust character does not, *ipso facto*, in all cases, exclude the jurisdiction of a court of law.

It seems that if an equitable action could have, and had, been brought to enforce the alleged liability, it would still have been subject to the legal limitation of six years.

(Argued March 7, 1889; decided March 19, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made at the February Term, 1887, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial without a jury.

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119 220
113 128
123 536
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135 525

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140 158
140 375
113 128
141 218

113 128
142 539

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f 158 868

113 128
172 16

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The complaint in this action alleged, in substance, that one Geiger and plaintiff, composing the firm of Geiger & Co., purchased, in April, 1871, of David J. Ely, defendant's testator, a quantity of teas, then in the custody of the Chicago & China Tea Company; that it was agreed between the purchasers and that company that it should hold the teas in store and insure the same for their benefit, which it did, together with other teas belonging to Ely; that the teas so insured were destroyed by fire and the insurance money for the whole collected and received by Ely in November, 1872, who wrongfully appropriated the whole thereof and paid no portion to Geiger or defendant, and refused to pay over or account for the same; that Geiger assigned all his interest in the claim to plaintiff. The relief demanded was that defendants account for and pay over to plaintiff all moneys received by reason of the destruction of the teas belonging to Geiger & Co.

The material facts are stated in the opinion.

Treadwell Cleveland for appellant. The claim in this action is not "upon a contract obligation or liability, express or implied," within section 382 of the Code of Civil Procedure, and the six-years statute of limitations is no bar to the present suit. (*Wyman v. Wyman*, 26 N. Y. 253, 256; *Walsh v. Ins. Co.*, 32 id. 427; *Cone v. Ins. Co.*, 60 id. 619; *Williams v. Everitt*, 14 East, 582.) Defendant's testator was a trustee accountable only in equity, entirely outside the jurisdiction of courts of law. (*Dias v. Brunell's Exr.*, 24 Wend. 9; *Williams v. Everitt*, 14 East, 582; Eng. Law Times, 1882, January 2, 1885.)

C. E. Tracy for respondents. In whatever way the company held Geiger & Co.'s tea, it, as bailee or warehouseman, had an insurable interest. (*Richmond v. Niagara Fire Ins. Co.*, 79 N. Y. 230, 238; *Dunlop v. Avery*, 89 id. 592.) Mr. Ely did not hold the insurance as upon teas owned by him, but as creditor of the company. (*Waring v. Indemnity Fire Ins. Co.*, 45 N. Y. 606; *Lee v. Adsit*, 37 id. 78, 89.)

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ANDREWS, J. The statute of limitations is, we think, a conclusive answer to the claim of the plaintiff upon his own theory of the cause of action. The plaintiff insists that Geiger & Co., whose rights he represents, became the equitable owners of a specific portion of the insurance money collected and which came to the hands of David J. Ely, the defendant's intestate. The teas of Geiger & Co. were in the possession of the Chicago & China Tea Company on the 9th day of October, 1871, when the fire occurred by which they were destroyed, together with a large quantity of other teas belonging to the company. The plaintiff claims that the teas of Geiger & Co., were covered by general policies of insurance taken out by the Chicago & China Tea Company, covering teas, "their own or held in trust, or on commission or sold but not delivered;" that the underwriters adjusted and paid the loss upon the basis that the teas of Geiger & Co. were included in the risk; that David J. Ely, the appointee in the policies, received the whole amount of the insurance as adjusted and that Geiger & Co. thereupon became equitably entitled to such a proportion thereof as the value of the teas owned by them bore to the value of the whole quantity destroyed.

The defendants claim that the policies were made payable to David J. Ely to secure advances by him to the Chicago & China Tea Company prior to the purchase by Geiger & Co. of the teas owned by them, and that he was entitled to apply the whole sum received on the policies to the payment of his debt, and that Geiger & Co. were not entitled to any portion thereof until his debt was fully paid. The policies were written before the purchase by Geiger & Co., and the advances made by Ely were greater than the sum received on the policies. The whole sum received was \$43,535, and the plaintiff procured a finding by the trial judge that in this sum was included \$5,841.25 paid by the insurers on account of the destruction of the teas of Geiger & Co. Geiger & Co. purchased the teas in 1871 of David J. Ely, who was the financial agent of the Chicago & China Tea Company, and paid him the full purchase-price. The teas were owned by the company at the

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time of the sale, but it is claimed by the plaintiff that the agency of Ely was not disclosed, and that Geiger & Co. supposed that the teas were owned by Ely and that he was the vendor. There is also proof tending to show that it was understood between Geiger & Co. and the Chicago & China Tea Company, subsequent to the purchase and before the fire, that the interest of Geiger & Co. was to be protected by insurance. Upon all the circumstances the plaintiff insists that when the insurance money was paid to Ely he took it impressed with a trust in favor of Geiger & Co., to the extent of their interest in the teas destroyed by the fire, as represented in the fund received, and was equitably bound to account to Geiger & Co. for their equitable interest.

Assuming that the plaintiff is right in his construction of the facts, the case falls within the familiar doctrine that money in the hands of one person, to which another is equitably entitled, may be recovered in a common-law action by the equitable owner upon an implied promise arising from the duty of the person in possession to account for and pay over the same to the person beneficially entitled. The action for money had and received to the use of another is the form in which courts of common law enforce the equitable obligation. The scope of this remedy has been gradually extended to embrace many cases which were originally cognizable only in courts of equity. Whenever one person has in his possession money which he cannot conscientiously retain from another, the latter may recover it in this form of action, subject to the restriction that the mode of trial and the relief which can be given in a legal action are adapted to the exigencies of the particular case, and that the transaction is capable of adjustment by that procedure, without prejudice to the interests of third persons. No privity of contract between the parties is required, except that which results from the circumstances. (*Mason v. Waite*, 17 Mass. 560.) The right on the one side, and the correlative duty on the other, create the necessary privity and justify the implication of a promise by the defendant to do that which justice and equity require.

It is immaterial, also, whether the original possession of the money by the defendant was rightful or wrongful. It is sufficient that the duty exists on his part, created by the circumstances, to account for and pay it over to the plaintiff.

Nor is this form of action excluded, because in a general sense there is a relation of trust between the parties arising out of the transaction. There are many cases of trust cognizable only in a court of equity. The cases of express trusts of property are generally of this kind. The duty of the trustee to the *cestui que trust*, to perform the trust and to account according to its terms and conditions, is as a general rule enforceable only in an equitable action. The necessity of taking an account, the frequent complexity of details, the separate and varied interests often affected, and the necessity of molding the relief to suit the circumstances, render the procedure of courts of equity peculiarly suitable in the administration of formal trusts, and in many cases indispensable to the ascertainment and enforcement of the rights and obligations of the parties. But the fact that money in the hands of one person is impressed with a trust in favor of another, or that the relation between them has a trust character, does not, *ipso facto*, exclude the jurisdiction of courts of law. The general rule that trusts are cognizable in equity and are enforceable only in an equitable action, is subject to many exceptions, "as, for instance, cases of bailments, and that larger class of cases where the action for money had and received for another's use is maintained *ex æquo et bono*." (Story's Eq. Jur. § 60; COMSTOCK, J., *Lawrence v. Fox*, 20 N. Y. 278.)

The present case falls within the exception. Upon the plaintiff's theory of the facts, Geiger & Co. were the equitable owners of a *pro rata* part of the insurance money received by Ely. That firm and Ely were alone interested in the question, as it is conceded that Ely was entitled to all the money received, subject only to the claim of Geiger & Co. The only accounting required was such as was necessary to ascertain the extent of the interest of Geiger & Co., and that depended upon simple facts as readily ascertainable in a legal as in an equi-

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table action. The case, therefore, presented a cause of action upon a liability implied by law, and it was subject to the limitation of six years prescribed by section 91 of the Code of Procedure, in force when the cause of action arose. The money was paid to Ely in 1871, and the facts were known to Geiger & Co. at or soon after that date. The action was commenced in 1881. Assuming that an equitable action could be brought to enforce the liability claimed, it would still be subject to the limitation of six years. (*Matter of Neilley*, 95 N. Y. 390.) The plaintiff cannot avoid the application of the statute by treating the actual appropriation of the money by Ely in 1874 as the cause of action. The right of Geiger & Co. to recover the money was perfect from the time of its actual receipt by Ely in 1871. (*Lillie v. Hoyt*, 5 Hill, 395.)

The judgment should be affirmed.

All concur.

Judgment affirmed.

JULIUS CATLIN, JR., et al., Executors, etc., v. THE TRUSTEES OF TRINITY COLLEGE et al., Appellants; GEORGE W. CHASE, as County Treasurer, etc., Respondent.

113	133
113	625
113	133
121	708
113	133
127	12

The provision of the Revised Statutes (1 R. S. 388, § 4, sub. 7), exempting from taxation "the personal property of every incorporated company not made liable to taxation on its capital in the fourth title" of the chapter containing it, does not include an incorporated college or religious society.

113	133
135	235
136	356
113	133
137	210

It seems the words "incorporated company" were intended to designate only such business and stock corporations, as by the chapter are, under special circumstances, exempted from taxation on their capital, and do not embrace corporations for religious, literary or charitable purposes not having a capital.

113	133
168	407

The acts of 1853 and 1857 (Chap. 654, Laws of 1853, and chap. 456, Laws of 1857), which repeal certain sections of said chapter, and so greatly restrict the operation of said provision, do not change the construction of the words "incorporated company," or extend their meaning so as to embrace other corporations than those to which they originally referred.

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A religious society, therefore, incorporated under the general act of 1813 (Chap. 60, Laws of 1813), providing for the incorporation of such societies, and a college not specially exempted from taxation by its charter or some special act, are included in the provision of the collateral inheritance tax act (Chap. 713, Laws of 1887), which subjects to the tax imposed by the act all property which shall pass by will to any "body, politic or corporate * * * other than to * * * the societies, corporations and institutions now exempted by law from taxation."

The words "now exempted by law" in said provision refer to exemptions under the laws of this state, and the exemption of a foreign corporation under the laws of the jurisdiction of origin, does not withdraw it from the operation of said act.

Accordingly *held*, that a college incorporated and located in another state was liable to taxation upon a legacy, given by the will of a resident of the state, although by its charter it is exempted from taxation.

(Reported below, 49 Hun, 278.)

(Argued March 5, 1889; decided March 19, 1889.)

APPEAL by defendants, the trustees of Trinity College and the Rector, etc., of St. Paul's Protestant Episcopal Church in the city of Poughkeepsie, from so much of a judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made June 25, 1888, as directed judgment on a case submitted, adjudging that said defendants were liable to taxation under the Collateral Inheritance Tax Act (Chap. 713, Laws of 1887), upon legacies.

Stephen M. Buckingham, a resident of Dutchess county, died December 1, 1887, leaving a will dated November 5, 1887, and probated January 17, 1888, in and by which, among other things, he provided :

"I also give and bequeath the following legacies :

* * * * *

"To Trinity College, at Hartford, Connecticut, the sum of fifty thousand dollars (\$50,000).

"To the rector, wardens and vestrymen of St. Paul's Protestant Episcopal Church in the city of Poughkeepsie and state of New York, the sum of ten thousand dollars; the income whereof shall be applied to general purposes of the parish in the maintenance of the worship of God therein in accordance with the forms and lawful usages of the Protestant Episcopal

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Church in the United States, and to the charitable work of the parish."

The legatee, Trinity College, was incorporated in 1823 by the laws of the state of Connecticut, and is located at Hartford in that state. By its charter it is exempted from taxation upon all property granted or given to it and the income thereof, with the limitation that the corporation shall not hold in Connecticut real estate exempt from taxation affording an income of more than \$6,000.

St. Paul's Church was incorporated in 1835 under the general act for the incorporation of religious societies (Chap. 60, Laws of 1813), and is located at Poughkeepsie city.

Luke A. Lockwood for Trustees of Trinity College, appellants. In construing this statute the legislative intent must be sought for. (*Hudson Iron Co. v. Alger*, 54 N. Y. 173, 175.) The college comes within the objects of the law-makers in the use of the language of the exemption clauses. (R. S., chap. 13, title 1, part 1, §§ 1, 4; *People v. Comrs. of Taxes*, 23 N. Y. 196; *People ex rel. Bay State, etc., Co. v. McLean*, 80 id. 259; 17 Hun, 205; *Graham v. First Nat. Bk.*, 84 N. Y. 401; *Boardman v. Bd. of Suprs.*, 85 id. 361.) The exemption of the college comes within the motives of the law-makers. (*Hollis v. Drew Theolog. Seminary*, 95 N. Y. 172.) This college can come into this state and take the legacy free of taxes under the law of comity. (*Hollis v. Drew Theolog. Seminary*, 95 N. Y. 175; *Sherwood v. American Bible Society*, 4 Abb. Ct. App. Dec. 227-232; *Kerr v. Dougherty*, 79 N. Y. 327.) The exemption of stocks owned by literary and charitable societies (§ 4, subd. 6) and all personal property (subd. 7) applies to colleges. (*People ex rel. American Geographical Society v. Tax Comrs.*, 11 Hun, 505; *People ex rel. Seminary v. Barber*, 42 id. 27; *N. Y. Infant Asylum v. Supervisors*, 31 Hun, 116; *People ex rel. Swiss Benevolent Society v. Comrs. of Taxes*, 36 id. 314.) An exemption in general terms of all the property of an institution extends only to the property actually used by the institution for its legitimate purposes. (Burroughs on Taxation, §§ 71, 72.)

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Martin Heermance for Rector, etc., St. Paul's Protestant Episcopal Church, appellants. This defendant is exempt from taxation on personal property. (Chap. 713, Laws of 1887, § 1; 2 R. S. [7th ed.] 982, subd. 7, § 4; *People ex rel Ithaca Savings Bank v. Beers*, 67 How. Pr. 222.) The rule requiring strict construction of statutory exemptions applies only to property used for purposes of private gain, a liberal construction, harmonizing with the policy of the law, is permissible and proper as to property used for literary, benevolent or religious purposes. (*People ex rel. Am. Geog. Soc. v. Tax Comrs.*, 11 Hun, 505; *In re Miller*, 5 Dem. 132; 45 Hun, 244.)

O. D. M. Baker for respondent. The rule of construction is that taxation extends to all property; exemption must be by express and positive enactment and is not allowed by implication. (*Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 506; *Roosevelt Hospital v. Mayor, etc.*, 84 id. 115; *People ex rel. v. Comrs.*, 76 id. 64; 82 id. 465; *Same v. Davenport*, 91 id. 585.) The expression in the act of 1887 (Chap. 713) "the societies, corporations and institutions now exempted by law from taxation" must be construed strictly. (*People ex rel. v. Comrs.*, 19 Hun, 463, 464.) At the time of the passage of the act of 1887, "societies" and "institutions" like these two appellants, were not exempted from taxation under the general taxation laws of the state. (R. S. [7th ed.] 981, §§ 1, 2, 3; *Chegary v. Mayor*, 13 N. Y. 230; *Trinity Church v. New York*, 10 How. Pr. 138.) The legacy to St. Paul's Church is subject to the tax imposed by the act of 1887 in any event. (*In re Miller*, 5 Dem. 132-138; 45 Hun, 244.) As to property in this state, Trinity College was not "exempted by law from taxation." (*Brinckerhoff v. Bostwick*, 99 N. Y. 190; *People ex rel. v. McLean*, 80 id. 253, 258 *State Tax on Bonds*, 15 Wall. 319; *Carpenter v. Comm.*, 17 How. [U. S.] 462; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Home of the Friendless v. Rouse*, 8 Wall. 436; *Miller v. Comm.*, 27 Gratt. 110; *Eyre v. Jacobs*, 14 id. 422, 424.) No question of comity

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arises here as that must be addressed to and determined by the law-making power of the state. (*People v. Fire Assn.*, 92 N. Y. 311.)

ANDREWS, J. The Collateral Inheritance Tax Act (Chap. 713, Laws of 1887), among other things, subjects to its provisions all property which shall pass by will to any "body politic or corporate * * * other than to * * * the societies, corporations and institutions now exempted by law from taxation."

Stephen M. Buckingham, a resident of Dutchess county, died December 1, 1887, leaving a will by which he gave a legacy of \$50,000 to Trinity College, a Connecticut corporation incorporated in 1823, located at Hartford in that state, and a legacy of \$10,000 to the St. Paul's Protestant Episcopal Church of Poughkeepsie, a religious society in this state, incorporated under the general act for the incorporation of religious societies, passed in 1813. The sole question is, whether these corporations were, at the time of the passage of the act of 1887, "exempted by law from taxation" within the meaning of that act. There is no exemption from taxation of the property of religious corporations organized under the act of 1813 by any provision therein, and the property of St. Paul's Church has not been exempted by any special statute. By a law of the state of Connecticut, passed in 1882, Trinity College is exempted from taxation on the principal and income of its invested funds and on its real estate, within certain limits measured by income. In determining the question presented, it will be convenient, in the first instance, to regard Trinity College as a domestic corporation, governed in respect to its liability to taxation by the same rules which apply to incorporated colleges in this state, not specially exempted from taxation by their charters or special acts.

The law regulating the taxation of corporations, in the absence of special legislation, is to be found in the general statutes of the state. The general rule of taxation is declared

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in section 1, title 1, chapter 13, part 1 of the Revised Statutes. That section declares that "all lands and all personal estate within the state, whether owned by individuals or by corporations, shall be liable to taxation, subject to the exemptions hereinafter specified." By this section all the real and personal estate of corporations is taxable, unless exempted in whole or in part by subsequent provisions of the chapter. When, therefore, a corporation not exempted from taxation by its charter, or some special enactment, but governed by the general law, claims exemption, it must be able to point to some provision in chapter 13, or to some amendment which takes it out of the general rule declared by section 1, above quoted, or else its claim must be disallowed. The counsel for the plaintiffs, conceding this to be the rule, insists that the personal property of incorporated colleges and religious societies in this state is exempted from taxation by the seventh subdivision of section 4 of title 1, chapter 13, which section specifies the property exempt from taxation, the specification in the seventh subdivision being, "the personal property of every incorporated company not made liable to taxation on its capital in the fourth title of this chapter."

This contention assumes that incorporated colleges and religious societies are "incorporated companies" within this subdivision. By reference to this fourth title it will be found that it deals exclusively with the subject of taxation of moneyed or stock corporations, and contains no reference to the taxation of charitable, religious, literary or other corporations or institutions not organized for business purposes, and this class of corporations is not made liable by that chapter to any taxation whatever, either on their real or personal estate. It must follow, therefore, if incorporated colleges, churches and eleemosynary institutions are "incorporated companies" within the meaning of subdivision 7 above quoted, as is claimed by the plaintiffs, then the subdivision operates as an entire and complete exemption from taxation of all the personal property held by such institutions in this state. But on looking at the other subdivisions of section 4, we find special and

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limited exemptions of personal property from taxation, which were wholly unnecessary if subdivision 7 was intended to have the broad and sweeping construction which is claimed by the defendants. Subdivision 3 exempts buildings "erected for the use of a college, incorporated academy or other seminary of learning, every building for public worship, every school-house, court-house and jail, and the several lots whereon such buildings are situated, and the *furniture* belonging to each of them." Subdivision 4 exempts "every poor-house, almshouse, house of industry, and every house belonging to a company incorporated for the reformation of offenders, and the real and *personal* property belonging to or connected with the same." Subdivision 5 exempts "the real and *personal* property of every public library." Subdivision 6 exempts "all *stocks* owned by the state or by literary or charitable institutions." The limited exemptions in subdivisions 3 and 6, and the complete exemptions in subdivisions 4 and 5, of the personal property of incorporated institutions mentioned, was a work of supererogation if the legislature intended by subdivision 7 to wholly exempt from taxation the personal property of all such institutions.

But coming more directly to the consideration of subdivision 7, and construing it in the light of the antecedent legislation in this state on the subject of taxation, and also in connection with chapter 4, to which it refers, we are of opinion that the words "incorporated company" used in that subdivision, were intended to designate only business and stock corporations, which by chapter 4 were, under the special circumstances therein stated, exempted from taxation on their capital, and that they do not embrace corporations not having a capital, or not being moneyed or stock corporations using their capital for the purpose of income or profit. The tax system in the Revised Statutes was a revision of previous legislation perfected by additional provisions recommended by the revisers or adopted by the legislature. Prior to the enactment of the Revised Statutes the general system of taxation was prescribed by chapter 262 of the Laws of 1823.

That act contained provisions for the taxation of corporations which were, to a considerable extent, embodied in the Revised Statutes. The second section partially exempted the property of colleges, incorporated academies, and also buildings for public worship, etc., from taxation. The fourteenth, fifteenth and sixteenth sections provided for the taxation of "incorporated companies receiving a regular income from the employment of capital," and other business corporations, using the phrase "incorporated companies" to designate business corporations only, as is manifest from a reading of those sections.

The general features of the act of 1823 for the taxation of incorporated companies were incorporated into the Revised Statutes as chapter 4, title 12. Chapter 4 is entitled "Regulations concerning the assessment of taxes on incorporated companies, and the commutation or collection thereof." It is sufficient for our present purpose to say that the general scheme of the legislature, as indicated by the provisions of this title, was to subject all moneyed and stock corporations to taxation on their capital, excepting, however, such of those corporations as were not in receipt of any profits or income (§ 9), and also all turnpike, bridge or canal companies whose net annual income did not exceed five per cent of the capital stock paid in, or secured to be paid in (§ 12); and manufacturing and marine insurance companies were permitted to commute their taxes when not in receipt of an actual income of more than five per cent on their capital (§ 11). Having in view this general scheme, it is quite obvious that the phrase "incorporated companies," used in the seventh subdivision of section 4, title 1, referred to business corporations which, by the provisions of title 4, were exempted from taxation on their capital, because in receipt of no income, or of income not beyond a certain amount. These companies, although belonging to the class of moneyed or stock corporations, were not taxable on their capital, or on their stock, and the purpose of subdivision 7 was to exempt their personal property, *eo nomine*, from taxation, and thereby make the intention to exempt them from taxation on personal estate in any form clear and unmistakable. It is plain, we

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think, that the phrase "incorporated companies," did not include incorporations for religious, literary or charitable purposes. These words would be quite inapt to describe an incorporated college, or an incorporated church or hospital, or eleemosynary society. This construction renders the different subdivisions of section 4, harmonious and consistent. The acts, chapter 654, of the Laws of 1853, and chapter 456 of the Laws of 1857, repealing sections 9, 11 and 12 and other sections of title 4, chapter 12 of the Revised Statutes, greatly restricted the operation of the seventh subdivision of section 4, title 1, but this did not change the construction of the words "incorporated companies" in that subdivision, or extend their meaning so as to embrace other corporations than those to which they originally referred.

The practical construction by the legislature is in accord with the view that the subdivision does not apply to religious, literary or charitable corporations. The legislature has in numerous instances exempted the real and personal property of particular corporations of this character from taxation. But this has been done under special laws designating the particular corporation intended to be benefited. Reference to a large number of statutes of this character, relating to charitable and other institutions in the city of New York, will be found in the valuable work of Mr. Davies on "System of Taxation," at page 288; and the statutes abound in instances of similar legislation affecting charitable and other institutions located in other parts of the state. These special acts were unnecessary so far as they exempted the personal property of the institutions mentioned from taxation, if they were embraced within the phrase "incorporated companies" in subdivision 7 of section 4, title 1, of the Revised Statutes.

It has never been the general policy of the state to wholly exempt the property, either real or personal, of incorporated churches, colleges, or charitable institutions from taxation. There was a limited exemption of real estate and personal property in the Revised Statutes. The policy of complete

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exemption, where adopted, has been accomplished through special acts applicable to particular and specified corporations. We know of no general statute exempting the personal property of religious societies or colleges from taxation, and we are of opinion that neither St. Paul's Church nor Trinity College was "exempted by law from taxation" within the collateral inheritance act of 1887.

Trinity College, as has been stated, is exempted from taxation by the law of Connecticut. It has no exemption under the laws of this state; and it seems plain that the words "now exempted by law," in the act of 1887, refer to exemptions under our laws, and that exemption of a foreign corporation from taxation under the laws of the jurisdiction of origin does not withdraw it from the operation of the inheritance tax law. There is certainly no comity which requires that colleges existing under the laws of other states should be placed in a more favorable situation under the act of 1887 than colleges organized under the laws of this state.

We think the judgment is right, and it should be affirmed.

All concur.

Judgment affirmed.

JOSEPH WALSH, Appellant, v. THE MAYOR, ALDERMEN AND
COMMONALTY OF THE CITY OF NEW YORK, Respondent.

The provision of the act of 1861 (Chap. 308, Laws of 1861), in relation to contracts by the city of New York, requiring that all contracts "shall be awarded to the lowest bidder for the same with adequate security and every such contract shall be deemed confirmed in and to such lowest bidder at the time of the opening of the bids, estimates or proposals therefor, and such contract shall be forthwith duly executed * * * with such lowest bidder," does not compel the making of a contract by the city with such lowest bidder. While no contract can be let to other than the lowest bidder, the body awarding the contract, acting in good faith, may refuse to award it to him if they deem it for the best interest of the city to do so; they may reject all the bids and readvertise.

In June, 1881, the department of docks of the city of New York advertised for proposals for work in building a pier and repairing other piers. The

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advertisement contained a notice to bidders that "the right to decline all estimates is reserved if deemed for the interest of the corporation." Three proposals were received for building the pier and two for repairing the others. Upon opening the bids it appeared that the bidders, other than plaintiff, proposed to do the work for sums which aggregated for both jobs \$14,500 less than plaintiff's bid, but their bids were not accompanied by checks as provided by the city ordinance. All of the bids were rejected, the work was readvertised and contracts for the work awarded to the lowest bidders under such readvertisement. Their bids were much less in the aggregate than plaintiff's original bid. Plaintiff brought this action to recover damages for a refusal to accept his bid under the first advertisement. *Held*, that the action was not maintainable.

(*Mem.* of decision below, 23 J. & S. 535.)

(Argued March 6, 1889; decided March 26, 1889.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York in favor of defendant, entered upon an order made November 21, 1887, which set aside a verdict in favor of plaintiff directed by the court, subject to the opinion of the court at General Term, and directed judgment to be entered in favor of defendant.

The nature of the action and the facts are sufficiently stated in the opinion.

E. J. Myers for appellant. The only remedy of a party occupying the plaintiff's position is an action for damages, because if all legal requirements have been performed he is absolutely entitled to the contract; it must be deemed confirmed in and to him at the time the bid was opened, under chapter 308 of the Laws of 1861. (*People v. Dowdney*, 99 N. Y. 641; *People ex rel. McKone v. Green*, 11 Hun, 56, 61; *People ex rel. Belden v. Contracting Bd.*, 27 N. Y. 378, 382; *People v. Foy*, 3 Lans. 398; *Baird v. Mayor, etc.*, 83 N. Y. 254, 259; *Devlin v. Mayor, etc.*, 63 id. 8, 25; *People v. Campbell*, 72 id. 496.) In such a case *mandamus* will not lie. (*People ex rel. Perkins v. Hawkins*, 46 N. Y. 9; *Ex parte Lynch*, 2 Hill, 45; *Ex parte Firemen's Ins. Co.*, 6 id. 343; *Shipley v. Mechanics' Bk.*, 10 Johns. 484; *People v. Croton Bd.*, 49 Barb. 259.) The commissioners were required to execute the contract to the lowest bidder, because, under the

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act (chap. 308) of 1861, they had no authority or power to advertise that they reserved the right to reject all bids. (*People ex rel. Dowdney v. Thompson*, 99 N. Y. 641; *Baird v. Mayor, etc.*, 83 id. 254, 258; *Hallock v. Donnelly*, 19 Pac. Rep. 680; *Lyddy v. Long Island City*, 104 N. Y. 218.)

John C. Shaw for appellant. The plaintiff, by exhibiting the check to the officer in charge and depositing it according to his direction with the proposal or estimate, was entitled to a reception and consideration of his bid. (Laws of 1873, chap. 335, § 91; Laws of 1881, chap. 147, § 1; Revised Ordinances of 1880, chap. 7, art. 1, §§ 2, 7; *In re Second Ave. M. E. Church*, 66 N. Y. 395; *In re New York, etc., Bridge*, 72 id. 527.) The plaintiff having performed all the conditions and requirements of law was entitled to have the contract awarded to him, or to recover damages for the failure so to do. (*Baird v. Mayor, etc.*, 83 N. Y. 254; *People ex rel. Dowdney v. Thompson*, 33 Hun, 641; *In re P. E. School*, 58 Barb. 161, 164; *In re Marsh*, 83 N. Y. 431; *Russ v. Mayor, etc.*, 12 Leg. Obs. 38; *Smith v. Mayor, etc.*, 10 N. Y. 504; *People ex rel. Dinsmore v. Croton Aqueduct Bd.*, 5 Abb. Pr. 316.)

David J. Dean for respondent. The commissioners of docks had the right to reject all the bids on the 29th of July, 1881, and readvertised the work. (Laws 1873, chap. 335, § 91; Laws 1881, chap. 147.) The term, "when given," in the statute clearly implies that a discretion may be exercised as to whether or not the contract shall be given at all. (*People ex rel. McKown v. Green*, 50 How. Pr. 503; *People v. Contracting Bd.*, 33 N. Y. 382; 27 id. 378; Laws 1857, chap. 446, p. 887; *People v. C. A. Bd.*, 6 Abb. Pr. 42.) The plaintiff's bid was irregular, because he failed to fulfill the condition precedent to the reception of his proposal prescribed by chapter 147 of the Laws of 1881, viz., a deposit with the head of the department of a certified check or money. (*People ex rel. Dowdney v. Thompson*, 33 Hun, 661; *Baird v. Mayor, etc.*, 83 N. Y. 254; *People ex rel. Wood v. Lacombe*, 99 id. 43, 49; *Bell v. Mayor, etc.*, 105 id. 139.)

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PECKHAM, J. In June, 1881, the department of docks of the city of New York advertised for proposals for doing work, (1), for building pier No. 57 North River; (2), for repairing six piers on the same river. In the advertisement for proposals for such work the department notified all bidders that "the right to decline all estimates is reserved if deemed for the interest of the corporation." Three proposals were received for building pier 57, and two were received for repairing the six piers. Upon opening the bids it appeared that bidders other than the plaintiff proposed to do the work for sums which in the aggregate for both jobs were \$14,500 less than the bids of the plaintiff for the same work. The bids of such others were, however, informal as they were not accompanied by the proper checks provided for by ordinance of the city, and hence no contracts could be awarded to such bidders. The commissioners of the dock department, therefore, rejected all the bids and advertised anew, and awarded contracts for the work to the lowest bidders under such re-advertisement, and they refused to enter into contract with the plaintiff, who was the lowest bidder on the first advertisement, whose bid was regular. The plaintiff now claims that the commissioners had no right to reject his bid, and has brought this action to recover damages for their refusal to enter into contract with him and to permit him to carry it out. It is admitted that his damages, if the refusal of the commissioners were illegal, and the action can be maintained, amount in all, on both jobs, to \$16,000. The court directed a verdict for that sum subject to the opinion of the court at General Term upon a case made, and that court directed judgment for the defendant, from which the plaintiff appeals here. There were other questions made in the case, among others that the plaintiff's own bids were irregular; but in the view we take of the case it is not necessary to discuss or decide them. The plaintiff contends that, by virtue of the provisions of chapter 308 of the Laws of 1861, entitled "An act relative to contracts by the mayor, aldermen and commonalty of the city of New

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York," his bid, being the lowest formal bid, entitled him as matter of right to an award of the contract at the time of the opening of the bids.

It is true that the language of that act is quite peremptory, and provides that all contracts "shall be awarded to the lowest bidder for the same, with adequate security, and every such contract shall be deemed confirmed in and to such lowest bidder, at the time of the opening of the bids, estimates or proposals therefor, and such contract shall be forthwith duly executed * * * with such lowest bidder." Under such law it is quite clear that no contract could be let to any person other than to the lowest bidder with adequate security. The obvious purpose was to secure to the city the advantages of having its work done by the lowest bidder therefor after proper advertisement. I do not think that it meant to compel the making of a contract even with such lowest bidder, if it were plain that the bids were all largely in excess of the real cost of the work. If by combination or other cause all of the bids were greatly in excess of such cost, and it so appeared to the commissioners, and that the true interests of the city demanded that none of such bids should be accepted, we think that such commissioners, acting in good faith, would have the right to reject them all, and advertise over again. The existence of such a power might frequently be necessary to protect the city against fraudulent combinations, evidenced, perhaps, by informal bids for low prices, and if such power did not exist, ending in the award of a contract to the lowest bidder whose bid was formal, but at a price enormously in excess of the real cost of the work. It was never intended, as we think, to render it absolutely necessary in such a case that an award of the contract should be made to such a bidder. It was meant that no contract should be awarded to any but the lowest bidder, and whether to him or not, would be a question for the body awarding the contract, acting in good faith, and for what they deemed the true interests of the city.

If otherwise, if there were but one bid, and that vastly in advance of a fair price and decent profit, nevertheless, the city

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would be bound to have such a contract saddled upon it. It would require the plainest commands from the legislature before we should be able to bring ourselves to think for a moment that any such result was intended. We do not think that the act cited contains such language, or that it was ever intended to accomplish any such end. In this case those who proposed to bid were distinctly warned in the advertisement that this right to decline all proposals was reserved, if it were deemed for the best interests of the city so to do.

The good faith of the commissioners is not impugned, and, indeed, it would be difficult to do it successfully in face of the fact that the plaintiff's bids were, in the aggregate, over \$14,500 more than other bids made at the same time, which were simply informal; and, upon a readvertisement, the bids which were accepted were for a much less aggregate sum than were the plaintiff's bids on the original advertisement.

There are no cases to which the plaintiff has called our attention that are in conflict with these views, and they lead to an affirmance of the judgment, with costs.

All concur.

Judgment affirmed.

ELLEN PHELAN, as Administratrix, Appellant, v. THE NORTH-
WESTERN MUTUAL LIFE INSURANCE COMPANY, Respondent.

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Defendant, a foreign insurance company, doing business in this state, issued a policy to P., plaintiff's intestate. Before a payment of premium became due it sent to P. a notice, in attempted compliance with one of the conditions of forfeiture for non-payment of premiums imposed by the act of 1877 (Chap. 321, Laws of 1877), *i. e.*, that "a notice stating when the premium will fall due, and that if not paid the policy * * * will become forfeited and void" must "be duly addressed and mailed to the person whose life is assured, at his last known post-office address, postage paid," at least thirty and not more than sixty days before the premium is payable. The notice, after stating the amount of the premium, the time when it would fall due, where it was to be paid, and that the conditions of the policy required payment to be made on or before the day the premium is due, added, "and members neglecting so to pay are

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carrying their own risks," and, as a postscript, "prompt payment is necessary to keep your policy in force." There was no statement that if payment was not made the policy would "become forfeited and void." *Held*, that the notice was not a compliance with the requirements of the statute and was insufficient to work a forfeiture.

The only proof of service of the notice was that it was found among the papers of the deceased two days after his death and seventeen days after the premium became due. The residence of the deceased at the time notice should have been given was "No. 45 Warren street, New York." This was known to and appeared upon defendant's books. The notice was addressed to him at No. 87 Barclay street. *Held*, that it was not to be presumed that the notice was mailed on the day of its date or that the envelope was properly addressed, on the contrary, the presumption, in the absence of other evidence, was that the address on the envelope corresponded to the address on the letter; nor was it to be presumed that the letter reached P. in due course of mail.

Phelan v. N. W. M. L. Ins. Co. (42 Hun, 419) reversed.

(Argued March 12, 1889; decided March 26, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 14, 1886, which affirmed a judgment in favor of defendant, entered upon an order dismissing the complaint on trial.

The nature of the action and the material facts are stated in the opinion.

Raphael J. Moses, Jr., for appellant. The manner of giving notice pointed out by the statute cannot be waived, the mode as much as the thing is a statutory requirement. (*Billings v. Pickett*, 39 Hun, 504.) *Carter v. Brooklyn Life Insurance Company* is decisive of this case. (110 N. Y. 15.)

David Willcox for respondent. The dates of written instruments are presumptive proof of the time when they were delivered. (*Costigan v. Gould*, 5 Denio, 200, 293; *People v. Snyder*, 41 N. Y. 397; *Livingston v. Arnoux*, 56 id. 507, 519; *Donnelly v. Deering*, 24 Week. Dig. 18; *Frankel v. Hays*, 20 id. 417.)

DANFORTH, J. The defendant is a life insurance company, organized under the laws of Wisconsin, but doing business in

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the state of New York. On the 31st of March, 1880, it issued a policy of insurance upon the life of George P. Phelan. The premiums were payable on or before the thirty-first day of March, June, September and December in each year, and the policy contains a provision that if the premiums are not paid at the times mentioned, the policy shall cease and determine. The premium that became due December 31, 1882, was not paid. It was tendered to the company about two o'clock on the 15th of January, 1883, but was refused. The insured died on the night of that day. The plaintiff is his administratrix, and sues upon the promise contained in the policy, to pay the sum assured in sixty days after notice and proof of death of the insured.

It is obvious upon the facts so far stated that no recovery could be had, for the condition upon which the defendant was to be liable had not been performed; but the plaintiff relies upon the statute of this state regulating the forfeiture of life insurance policies (Laws of 1877, chap. 321), and claims to enforce the policy upon the ground that the defendant failed to do that which the statute exacts as a condition of forfeiture. The statute (*supra*) declares that "no life insurance company doing business in this state shall have power to declare forfeited or lapsed any policy thereafter issued by reason of non-payment of premium, unless, after it becomes due, a notice stating the amount of such premium, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, at his last known post-office address, postage paid by the company, and further stating that unless the premium then due shall be paid to the company or its agent within thirty days after the mailing of such notice, "the policy and all payments thereon will become forfeited and void;" and the statute provides that in case such payment is made within the thirty days limited therefor, it shall be deemed a full compliance with the requirements of the policy in respect to the payment of premium, and declares that no such policy shall in any case be forfeited until the

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expiration of thirty days after the mailing of such notice. There is no pretense that this notice was given, but, on the contrary, the argument of the defendant is to the effect that it did another thing which the statute makes equivalent thereto. As to that the provision is that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner "above stated," at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the notice before provided for. That such notice had been given was a fact to be established by the defendant before its defense could be maintained, and whether it was so established is the only question on this appeal.

The defendant relies upon a paper found, after the death of the insured, among his effects and reading as follows:

"OFFICE OF THE
NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

MILWAUKEE, WIS., *November 1, 1882.*

GEORGE F. PHELAN, 37 *Barclay Street*:

The 4 qr. premium of \$17.40 on your policy, No. 102320, falls due at the office of the agent of this company in New York city, N. Y., before noon on the 31st day of December, 1882.

The conditions of your policy are that payment must be made on or before the day the premium is due, and members neglecting so to pay are carrying their own risk. Agents have no right to waive forfeitures.

Please present this notice at time of payment.

Yours, respectfully,

J. W. SKINNER,

Secretary.

H. M. MUNSELL, *Gen'l Agent,*

*Northwestern Mutual Life Co., 160 Fulton St.
Office, Cor. Broadway, N. Y. City.*

Prompt payment is necessary to keep your policy in force."

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No proof was given of compliance with the statutory provision in regard to the mailing of the notice, but the argument of the respondent is that the regularity of its proceedings in those respects is to be inferred from the fact that the notice was found among the papers of the deceased. The evidence is insufficient for that deduction. It appears that the residence of the deceased at the time the notice should have been given was 45 Warren street, New York; that the company had been apprised of that fact and had so entered it upon their books. Moreover, the agent of the defendant testified that "the post-office address of Phelan appeared upon the books to be as above stated." The notice produced was not so addressed. It was addressed to him at 37 Barclay street. It may be presumed that it reached that place in due course after it was mailed. But when was it mailed? There is no evidence as to that. The date is of no importance, and is evidence of no statutory fact. Within the cases cited by the respondent it might, in a proper case, be presumed that its date represented the day it was prepared or written, but nothing more. Certainly it cannot be considered as just ground for inferring the wholly distinct and vital fact that it was put in the mail on that day, nor that the envelope was properly addressed. In the absence of other evidence the presumption is the address on the envelope corresponded to the address in the letter. Nor does the fact that the notice was in the possession of the assured on the 17th of January, 1883, afford any ground for inference that he received it in due course of mail, nor that it was served upon him or received by him at any day earlier than January seventeenth.

We are also of opinion that the notice does not in its terms conform to the statute. Many ignorant and unlearned people seek to avail themselves of the advantages proposed by these companies. The statute is designed for the protection of all classes, and the language it prescribes for notice is intelligible to all. To say that in a declared event "a policy will become forfeited and void," conveys a meaning easily to be comprehended. To refer to the policy and conditions and say that

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"members neglecting so to pay are carrying their own risk," is quite another thing; and while it may be comprehensible to those versed in the language of insurers and accustomed to their phraseology, it is not the language of the statute and does not embody the notice which the statute requires. The principle upon which our decision, in the recent case of *Carter v. Brooklyn Life Insurance Company* (110 N. Y. 15), rests, applies and requires that the appeal should succeed.

The judgment of the court below should, therefore, be reversed and a new trial granted, with costs to abide the event.

All concur, RUGER, Ch. J., in result, and PECKHAM and GRAY, JJ., on first ground stated in opinion.

Judgment reversed.

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HENRY C. ADAMS, Appellant, v. RICHARD J. MORRISON,
Public Administrator, Impleaded, etc., Respondent.

It is only when there is a general reputation that two or more persons are copartners, and they knowing it, permit others to act upon it, who, induced thereby, give credit to the reputed firm, that these facts can be proved and availed of to estop the reputed members of the firm from denying its existence, and then only in favor of such outside parties.

In an action wherein plaintiff sought to establish a copartnership between himself and defendant's intestate, as attorneys, plaintiff, as a witness in his own behalf, was allowed to testify to declarations of the deceased to third persons in his presence to the effect that they were copartners. He was then asked: "Who received the receipts of the office?" "Was money paid into the office?" and offered to testify that he did not receive money paid into the office for business done in the office, and that the charges made in a certain case, in which he appeared as attorney, were paid to decedent. This was excluded as immaterial and incompetent under the Code of Civil Procedure (§ 829.) *Held*, no error.

Plaintiff offered to prove, by his own testimony, that about the time he claimed the partnership was formed the deceased made an entry in his presence, in a docket or register, of name of himself and plaintiff as a firm. This was objected to as incompetent under the said Code and excluded. *Held*, no error; that it involved a personal transaction between the witness and deceased.

(Argued March 15, 1889; decided March 26, 1889.)

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APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 24, 1886, which affirmed a judgment entered upon a decision of the court dismissing the complaint.

The nature of the action and the facts are sufficiently stated in the opinion.

Z. S. Westbrook for appellant. A partnership existed between plaintiff and defendant's intestate. (2 H. B. L. 235; 1 Smith's L. C. 974, 1180; Colyer Part. § 2; 3 Kent's Com. 23, 24; 3 Harrison, 485; 10 Me. 489.) That a partnership existed may be proved, in the absence of a distinct contract, verbal or written, by acts, facts and circumstances sufficient to establish a *quasi* partnership. (1 Caines, 184; 9 C. B. 457; 3 C. B. [N. S.] 562, 563; 9 Bing. 117; 3 Harr. 358; 4 id. 190; 6 Conn. 347; 1 Pars. on Con. 156, note z.) The partnership may be inferred from various circumstances. (4 Russ. Ch. 247; 2 Bli. [N. S.] 215; 3 Bro. P. C. 548; 5 id. 482; 1 Stark. 81 v., 405; *Peacock v. Peacock*, 2 Camb. 45; *Fromont v. Coupland*, 2 Bing. 170.) As against one defendant, evidence of his own admissions, or that he represented or conducted himself in such a manner as to induce belief, etc., is competent for the purpose of proving the existence of a firm. (3 Watts [Pa.] 101; 62 Penn. St. 374; 17 Serg. & Rawle, 453, 458; 15 Mass. 388, 389; 17 Vt. 449; 49 N. Y. 601, 617.) Holding out, etc., is enough to hold a legal presumption of partnership. (61 N. Y. 456.) General reputation, in connection with corroborative circumstances, may be proved in evidence of a partnership. (*Whitney v. Sterling*, 14 Johns. 215; *Gowan v. Jackson*, 20 id. 176; Cowen's Treatise [3d ed.] 93; *Halliday v. McDougall*, 30 Wend. 81; 22 id. 274.) It is competent to prove general reputation connected with corroborative circumstances to establish a partnership. (*Halliday v. McDougall*, 22 Wend. 264; *Whitney v. Sterling*, 14 Johns. 215; *Gowan v. Jackson*, 20 id. 176; *McPherson v. Rathbone*, 11 Wend. 98; *Allen v.*

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Rostain, 11 Serg. & Rawle, 373.) The court erred in excluding the testimony of plaintiff as a witness in his own behalf to show that the receipts of the business transacted by himself and father were paid to the latter. (*Denise v. Denise*, 110 N. Y. 562, 567; *Simmons v. Havens*, 101 id. 427, 433; *Lerche v. Brasher*, 104 id. 157; *Simmons v. Sisson*, 26 id. 264; *Lobdell v. Lobdell*, 36 id. 327; *Hildebrant v. Crawford*, 65 id. 107; *Sanford v. Sanford*, 61 Barb. 293; *Cary v. White*, 59 N. Y. 336.) The court erred in excluding the evidence offered by plaintiff as a witness in his own behalf to show that at one time, in his presence, his father made an entry in one of the books of the law office, being a docket or register, of the firm name of "H. & H. C. Adams, September, 1841," as partners, the book having been destroyed by a fire. (*Simmons v. Havens*, 101 N. Y. 433.)

Robert F. Little for respondent. General rumors or what people say is hearsay and nothing more, are not competent where a party is endeavoring to show by rumor that he was in partnership with another. The court and not the public must pass upon the circumstances that the parties had offices together, and what the public infer is irrelevant and incompetent as proof. (*Halliday v. McDougall*, 20 Wend. 81; *S. C.*, 22 id. 264; *Lindley on Partnership* [Ewell], 92, note 1; *Smith v. Griffith*, 3 Hill, 333-336.)

EARL, J. This action was commenced by the plaintiff to establish that a copartnership existed between him and his father, Henry Adams, from 1841 to the decease of the latter in 1875, in the practice of the law in the county of Montgomery, and for an accounting in reference to such copartnership. The trial judge found that the plaintiff and Henry Adams never carried on any business as copartners, and therefore dismissed the complaint. We think there was ample evidence to sustain the finding. There were no written articles of copartnership. There was no evidence that, during the many years which the copartnership was alleged by the plaintiff to have continued, the firm name was signed to any paper

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or document in the extensive law business carried on, both by the plaintiff and his father, or that any sign was placed upon the office containing the firm name. All suits and legal proceedings, instituted in the office occupied for many years by the two parties, were commenced either in the name of Henry Adams as attorney or in that of Henry C. Adams as attorney, but never in the name of both of them as a firm. During a portion of the time there was a firm of Adams & Lobdell and of Adams & Darrow, and for at least one year of the time the plaintiff occupied a separate office from his father. It also appears that for nearly twenty years before his death Henry Adams had substantially ceased to practice law; that in 1866 he moved from this state to New Jersey; that the plaintiff remained on intimate terms with his father until his death in 1875, and that this action was not commenced until 1884, about nine years after the death of Henry Adams, and nearly thirty years after he had discontinued the practice of the law. There are other facts and circumstances legitimately tending to show that he and his father were not copartners. It was, however, possible for the trial judge to have found upon the evidence that a copartnership existed between them, but his finding that it did not exist is based upon sufficient evidence and concludes us. The judgment must, therefore, be affirmed, unless there was some error committed in the rulings upon the trial.

The plaintiff sought upon the trial to prove the copartnership between him and his father by reputation. The evidence was objected to and excluded. We are not aware of any decision, or even any dictum, to the effect that, in favor of a person claiming to be a member of a copartnership, general reputation is competent for the purpose of establishing the copartnership. In *Robinson v. Green* (5 Harr. 115), it was held that to prove a partnership as between partners the evidence must be stronger than in other cases. It was said, in some of the earlier cases in this state, that general reputation was competent in favor of an outside party suing persons alleged to be partners to establish the copartnership. (*Whitney*

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“members neglecting so to pay are carrying their own risk,” is quite another thing; and while it may be comprehensible to those versed in the language of insurers and accustomed to their phraseology, it is not the language of the statute and does not embody the notice which the statute requires. The principle upon which our decision, in the recent case of *Carter v. Brooklyn Life Insurance Company* (110 N. Y. 15), rests, applies and requires that the appeal should succeed.

The judgment of the court below should, therefore, be reversed and a new trial granted, with costs to abide the event.

All concur, RUGER, Ch. J., in result, and PECKHAM and GRAY, JJ., on first ground stated in opinion.

Judgment reversed.

118	152
164	245

HENRY C. ADAMS, Appellant, v. RICHARD J. MORRISON,
Public Administrator, Impleaded, etc., Respondent.

It is only when there is a general reputation that two or more persons are copartners, and they knowing it, permit others to act upon it, who, induced thereby, give credit to the reputed firm, that these facts can be proved and availed of to estop the reputed members of the firm from denying its existence, and then only in favor of such outside parties.

In an action wherein plaintiff sought to establish a copartnership between himself and defendant's intestate, as attorneys, plaintiff, as a witness in his own behalf, was allowed to testify to declarations of the deceased to third persons in his presence to the effect that they were copartners. He was then asked: “Who received the receipts of the office?” “Was money paid into the office?” and offered to testify that he did not receive money paid into the office for business done in the office, and that the charges made in a certain case, in which he appeared as attorney, were paid to decedent. This was excluded as immaterial and incompetent under the Code of Civil Procedure (§ 829.) *Held*, no error.

Plaintiff offered to prove, by his own testimony, that about the time he claimed the partnership was formed the deceased made an entry in his presence, in a docket or register, of name of himself and plaintiff as a firm. This was objected to as incompetent under the said Code and excluded. *Held*, no error; that it involved a personal transaction between the witness and deceased.

(Argued March 15, 1889; decided March 26, 1889.)

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APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 24, 1886, which affirmed a judgment entered upon a decision of the court dismissing the complaint.

The nature of the action and the facts are sufficiently stated in the opinion.

Z. S. Westbrook for appellant. A partnership existed between plaintiff and defendant's intestate. (2 H. B. L. 235; 1 Smith's L. C. 974, 1180; Colyer Part. § 2; 3 Kent's Com. 23, 24; 3 Harrison, 485; 10 Me. 489.) That a partnership existed may be proved, in the absence of a distinct contract, verbal or written, by acts, facts and circumstances sufficient to establish a *quasi* partnership. (1 Caines, 184; 9 C. B. 457; 3 C. B. [N. S.] 562, 563; 9 Bing. 117; 3 Harr. 358; 4 id. 190; 6 Conn. 347; 1 Pars. on Con. 156, note z.) The partnership may be inferred from various circumstances. (4 Russ. Ch. 247; 2 Bli. [N. S.] 215; 3 Bro. P. C. 548; 5 id. 482; 1 Stark. 81 v., 405; *Peacock v. Peacock*, 2 Camb. 45; *Fromont v. Coupland*, 2 Bing. 170.) As against one defendant, evidence of his own admissions, or that he represented or conducted himself in such a manner as to induce belief, etc., is competent for the purpose of proving the existence of a firm. (3 Watts [Pa.] 101; 62 Penn. St. 374; 17 Serg. & Rawle, 453, 458; 15 Mass. 388, 389; 17 Vt. 449; 49 N. Y. 601, 617.) Holding out, etc., is enough to hold a legal presumption of partnership. (61 N. Y. 456.) General reputation, in connection with corroborative circumstances, may be proved in evidence of a partnership. (*Whitney v. Sterling*, 14 Johns. 215; *Gowan v. Jackson*, 20 id. 176; Cowen's Treatise [3d ed.] 93; *Halliday v. McDougall*, 30 Wend. 81; 22 id. 274.) It is competent to prove general reputation connected with corroborative circumstances to establish a partnership. (*Halliday v. McDougall*, 22 Wend. 264; *Whitney v. Sterling*, 14 Johns. 215; *Gowan v. Jackson*, 20 id. 176; *McPherson v. Rathbone*, 11 Wend. 98; *Allen v.*

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The judgment of the court below should, therefore, be reversed and a new trial granted, with costs to abide the event.

All concur, RUGER, Ch. J., in result, and PECKHAM and GRAY, JJ., on first ground stated in opinion.

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118	152
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(Argued March 15, 1889; decided March 26, 1889.)

Statement of case.

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The nature of the action and the facts are sufficiently stated in the opinion.

Z. S. Westbrook for appellant. A partnership existed between plaintiff and defendant's intestate. (2 H. B. L. 235; 1 Smith's L. C. 974, 1180; Colyer Part. § 2; 3 Kent's Com. 23, 24; 3 Harrison, 485; 10 Me. 489.) That a partnership existed may be proved, in the absence of a distinct contract, verbal or written, by acts, facts and circumstances sufficient to establish a *quasi* partnership. (1 Caines, 184; 9 C. B. 457; 3 C. B. [N. S.] 562, 563; 9 Bing. 117; 3 Harr. 358; 4 id. 190; 6 Conn. 347; 1 Pars. on Con. 156, note z.) The partnership may be inferred from various circumstances. (4 Russ. Ch. 247; 2 Bli. [N. S.] 215; 3 Bro. P. C. 548; 5 id. 482; 1 Stark. 81 v., 405; *Peacock v. Peacock*, 2 Camb. 45; *Fromont v. Coupland*, 2 Bing. 170.) As against one defendant, evidence of his own admissions, or that he represented or conducted himself in such a manner as to induce belief, etc., is competent for the purpose of proving the existence of a firm. (3 Watts [Pa.] 101; 62 Penn. St. 374; 17 Serg. & Rawle, 453, 458; 15 Mass. 388, 389; 17 Vt. 449; 49 N. Y. 601, 617.) Holding out, etc., is enough to hold a legal presumption of partnership. (61 N. Y. 456.) General reputation, in connection with corroborative circumstances, may be proved in evidence of a partnership. (*Whitney v. Sterling*, 14 Johns. 215; *Gowan v. Jackson*, 20 id. 176; Cowen's Treatise [3d ed.] 93; *Halliday v. McDougall*, 30 Wend. 81; 22 id. 274.) It is competent to prove general reputation connected with corroborative circumstances to establish a partnership. (*Halliday v. McDougall*, 22 Wend. 264; *Whitney v. Sterling*, 14 Johns. 215; *Gowan v. Jackson*, 20 id. 176; *McPherson v. Rathbone*, 11 Wend. 98; *Allen v.*

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Rostain, 11 Serg. & Rawle, 373.) The court erred in excluding the testimony of plaintiff as a witness in his own behalf to show that the receipts of the business transacted by himself and father were paid to the latter. (*Denise v. Denise*, 110 N. Y. 562, 567; *Simmons v. Havens*, 101 id. 427, 433; *Lerche v. Brasher*, 104 id. 157; *Simmons v. Sisson*, 26 id. 264; *Lobdell v. Lobdell*, 36 id. 327; *Hildebrant v. Crawford*, 65 id. 107; *Sanford v. Sanford*, 61 Barb. 293; *Cary v. White*, 59 N. Y. 336.) The court erred in excluding the evidence offered by plaintiff as a witness in his own behalf to show that at one time, in his presence, his father made an entry in one of the books of the law office, being a docket or register, of the firm name of "H. & H. C. Adams, September, 1841," as partners, the book having been destroyed by a fire. (*Simmons v. Havens*, 101 N. Y. 433.)

Robert F. Little for respondent. General rumors or what people say is hearsay and nothing more, are not competent where a party is endeavoring to show by rumor that he was in partnership with another. The court and not the public must pass upon the circumstances that the parties had offices together, and what the public infer is irrelevant and incompetent as proof. (*Halliday v. McDougall*, 20 Wend. 81; *S. C.*, 22 id. 264; *Lindley on Partnership* [Ewell], 92, note 1; *Smith v. Griffith*, 3 Hill, 333-336.)

EARL, J. This action was commenced by the plaintiff to establish that a copartnership existed between him and his father, Henry Adams, from 1841 to the decease of the latter in 1875, in the practice of the law in the county of Montgomery, and for an accounting in reference to such copartnership. The trial judge found that the plaintiff and Henry Adams never carried on any business as copartners, and therefore dismissed the complaint. We think there was ample evidence to sustain the finding. There were no written articles of copartnership. There was no evidence that, during the many years which the copartnership was alleged by the plaintiff to have continued, the firm name was signed to any paper

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The plaintiff sought upon the trial to prove the copartnership between him and his father by reputation. The evidence was objected to and excluded. We are not aware of any decision, or even any dictum, to the effect that, in favor of a person claiming to be a member of a copartnership, general reputation is competent for the purpose of establishing the copartnership. In *Robinson v. Green* (5 Harr. 115), it was held that to prove a partnership as between partners the evidence must be stronger than in other cases. It was said, in some of the earlier cases in this state, that general reputation was competent in favor of an outside party suing persons alleged to be partners to establish the copartnership. (*Whitney*

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v. *Sterling*, 14 Johns. 215; *Gowan v. Jackson*, 20 id. 176; *M'Pherson v. Rathbone*, 11 Wend. 98; *Halliday v. McDougall*, 22 id. 264.) But in *Smith v. Griffith* (3 Hill, 333), the rule was finally settled that even in an action against persons as copartners by an outside party, evidence of general reputation is not competent to establish the existence of the copartnership. The court there said that "such evidence was unsupported by any sound or analogous principles, the rule itself of most dangerous tendency in practical operation, and one which had been rather acquiesced in, as respected a few cases, than established by any settled adjudication of this court." And since that decision evidence of general reputation has never, so far as we can find, been received in this state to establish a copartnership. As such evidence alone is not sufficient or competent to establish a copartnership, so, too, it is not competent in corroboration of other evidence. If the other evidence be insufficient to establish the copartnership, then the party bound to establish it must fail, and he cannot supply the defect in his proof by evidence of general reputation; and such is the general rule in this country and in England. (1 Lindley on Partnership [2d Am. ed.] 84, note.) But when there is a general reputation that two or more persons are copartners, and they know it and permit other persons to act upon it, and to be induced thereby to give credit to the reputed firm, these facts may be proved and may be sufficient sometimes to estop the reputed members of the firm from denying the copartnership in favor of outside parties.

Upon the trial of the action the plaintiff was a witness in his own behalf, and certain questions put to him were excluded under section 829 of the Code. He was permitted to testify to declarations made by his father to other persons in his presence, to the effect that he and his father were copartners. He was asked these questions: "Who received the receipts of the office?" "Was money paid into the office?" And he offered to testify that he did not receive money paid into the office for business done in the office, and that the charges made in a certain case in which he appeared as attorney were

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paid to his father. The evidence was objected to as irrelevant, immaterial and incompetent under section 829, and the objections were sustained. The evidence was claimed to be competent upon the question of the existence of the copartnership. We think that the bearing of the evidence excluded upon that question was so remote and uncertain that it could all have been excluded as immaterial, and that it is impossible to say that its exclusion prejudiced the plaintiff. The two persons, father and son, occupied the same office and were to some extent concerned in the same business; and whether the one or the other received the money could have but little bearing upon the question whether they were doing business as copartners. But we think the evidence was also properly excluded under section 829. The issue was whether there was a copartnership, and the evidence was offered to prove the facts stated by the living party for the purpose of establishing the copartnership. If the evidence could in any way have been material, it must be because the receipt and payment of the money were transactions in which both parties were concerned. The money was paid to and received by one with the consent and acquiescence of the other, and this in some sense involved a personal transaction.

The plaintiff also offered to prove by his own evidence that about the time when he claims the copartnership was formed his father made an entry in one of the books of the office, being a docket or register, of the firm name of "H. & H. C. Adams. Sept. 1841." This was objected to by defendants as incompetent under section 829 and excluded, and we think properly. The offer was to show that this entry was made in the presence of the witness by his father, for the purpose of establishing the commencement or existence of the copartnership at that time. The entry must have been made by the father as evidence to his son that he then recognized the copartnership, or by arrangement between them to furnish proof of the existence of the copartnership, or as a declaration that that was a partnership book to be kept and used as such, or for some kindred purpose; and in any event the plaintiff

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was incompetent to give the evidence. (*Holcomb v. Holcomb*, 95 N. Y. 316; *Clift v. Moses*, 112 N. Y. 426; *In the Matter of the Probate of the Will of Eysaman*, decided in this court March 12, 1889, *ante p.* 62.)

We are, therefore, of opinion that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

GEORGE C. GENET et al., as Executors, etc., Trustees, etc.,
Appellants, v. MARY R. HUNT et al., Respondents.

In 1853, C., in contemplation of marriage, executed a trust deed of all her estate, real and personal, to certain trustees to hold the same during coverture or until her death, if she should "not survive her said coverture," and apply the profits and income "as received, and not by anticipation," to her sole and separate use. In case of her death during coverture the deed provided that the trustees should convey and deliver all the trust estate remaining to such devisees and in such shares as she should by will direct, and in default of any such direction unto such person or persons "being her heir or heirs-at-law as would be entitled to take the same by descent from her in case the same was land belonging to her, situate in the state of New York." The contemplated marriage took place, and C. died during coverture, leaving two children, the issue of the marriage, surviving her, also leaving a will, by which she gave all of her estate to the executors in trust, to apply the rents and profits to the maintenance of, or pay the same over to, her children in equal parts during their lives, with remainder, on the death of either, of his share, to his heirs and next of kin. In case of the death of either child during minority and without issue, the whole estate to be held in trust for the survivor during life, with remainder to his heirs and next of kin. In case of the death of both children during minority and without issue, the whole estate was given absolutely to designated beneficiaries. In an action for the construction of the will, *held*, that the trust deed created a valid trust (1 R. S. 728, § 55, sub. 3), which neither the settlor alone, nor in conjunction with the trustees, could abrogate; that the power of disposition reserved in the deed was not an absolute power equivalent to absolute ownership (1 R. S. 733, § 85); that the will, therefore, was not an exercise by the testatrix of the "*jus disponendi*" incident of ownership, but simply the execution of a power of appointment, and therefore the question as to the validity of the trusts in the will was to be considered

113	158
125	461
113	158
127	538
113	158
141	505

113	158
148	526

113	158
154	259
113	158
f161	220
161	221

113	158
167	281

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in view of the trust deed and the statute of powers (1 R. S. 732, § 73 *et seq.*), and the period during which the right of alienation might be suspended was to be computed "from the time of the creation of the power" (§ 128), and so considered the trusts created by the will were in contravention of the statute against perpetuities as they were limited upon and made possible a suspension of the power of alienation of the real estate and the absolute ownership of the personal property for three lives, two of them not in being at the time of the creation of the power.

Also, *held*, that the difficulty was not removed by the provision of the Married Woman's Act (§ 2, chap. 375, Laws of 1849), providing that a trustee holding any property for a married woman may convey the same to her, on her written request, accompanied by a certificate of a justice of the Supreme Court that he has examined the property and made due inquiry as to the capacity of the married women to manage and conduct the same; that, assuming the trust in question was within that act, the disability imposed upon the trustee of an express trust by the general statute was not removed until the prescribed certificate was obtained; but *held*, that the act did not apply; that it was applicable only to nominal trusts, the sole object of which was to secure a married woman in the enjoyment of her separate estate.

(Argued January 28, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 22, 1887, which affirmed a judgment entered upon a decision of the court on trial at Special Term.

This action was brought by plaintiffs, as executors of the will of Caroline M. Riggs, deceased, to obtain a judicial construction of said will.

In 1853, Mrs. Riggs, then Miss Field, in anticipation of marriage with George F. Riggs, executed a trust deed, by which she conveyed all of her estate, real and personal, to trustees.

The terms of the trust, as stated in said deed, are as follows :

"*In trust*, nevertheless, that the said parties of the second part, the survivors or survivor of them, his heirs, executors, administrators or assigns, shall and do receive the rents, issues, profits and income thereof, for these presents, if the said party of the first shall so long live, and in case she, the said party of the first part, shall marry within the said term of one year, then

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for and during the continuance of the coverture created by such marriage, and that the said parties of the second part, the survivors or survivor of them, his heirs, executors or administrators, during such term of one year, or during such coverture as the case may be, shall and do apply the said rents, issues, profits and income as received, and not by anticipation, to the sole and separate use of her, the said party of the first part, for and during the said term of one year or such coverture as aforesaid, in like manner as if she, the said party of the first part, were a *feme sole*, and in such manner as to be free from the control, disposition, debts or incumbrances of any husband she may marry within the said term of one year, and in case the said party of the first part shall be discoverd at the end of the said term of one year, or such marriage shall take place within that term, and she, the said party of the first part, shall survive her said respected coverture thereby created, then either of such events, upon this further trust that they, the said parties of the second part, the survivors or survivor of them and his heirs, executors or administrators, shall and do forthwith, upon the expiration of the said term of one year or of such coverture, as the case may be, grant, convey, assure and deliver over absolutely to the said party of the first part, all and whatsoever may remain of the said hereby granted premises, and in case such marriage shall take place within the said term of one year, and the said party of the first part shall not survive her said coverture thereby created, then upon this further trust, that they, the said parties of the second part, the survivors or survivor of them, his heirs, executors or administrators, do grant, bargain assure and deliver all and whatsoever may remain of the hereby granted premises upon such devisee or devisees in such share or proportion as she, the said party of the first part, by her last will and testament, may direct, which will and testament she, the said party of the first part, is empowered, authorized and enabled to make, and by force of these presents, without any other or further reservation of power in that behalf, the same to alter, revoke and make anew with the same or different provisions from time to time and at all times during her

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said coverture, notwithstanding her said coverture, at her free will and pleasure, in like manner as if she was a *feme sole*, provided, nevertheless, that every such alteration or revocation be made in writing subscribed by the said party of the first part, and attested by two subscribing witnesses. And provided, further, that she, the said party of the first part, shall not, however, exercise at any time during such coverture any power of anticipation in respect to the said hereby granted premises or any part thereof, than is by these presents expressly reserved or granted unto her, the said party of the first part, and in default of any such direction or in respect to any of the said hereby granted premises, as to which there shall not be any such direction duly and effectually made, upon this further trust that upon the death of the said party of the first part discover, as aforesaid within the said term of one year or afterwards during her said coverture, they, the said parties of the second part, the survivors or survivor of them, his heirs, executors or administrators, shall and do grant, convey, assure and deliver all and whatever may remain of the hereby granted premises, after satisfying any such direction that may be so made as aforesaid, of a part only of the said hereby granted premises, unto such person or persons living at the death of the said party of the first part, and being her heir or heirs-at-law, as would be entitled to take the same by descent from her, in case the same was land belonging to her, situate in the State of New York, and if more than one person, then in the proportion in that behalf prescribed by the laws of the said state."

The contemplated marriage took place. Mrs. Riggs died in coverture in 1884, leaving two children surviving, and leaving a will executed in June, 1867, the terms of which, so far as material, are as follows:

"After the payment of all my just debts and funeral and testamentary charges, I direct my said estate to be set apart into two equal shares or portions for the benefit of my two children, George Field, and Mary Rebecca, respectively.

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"I direct my executors and trustees hereinafter named, after the payment of said debts and expenses, to take the charge of all my property and estate above-mentioned, and to rent, manage and control the same, or to convert the same or such parts of the same as they shall think the true interests of the beneficiaries of my estate require, into bonds and mortgages or state or national securities, or in any or either of them, and the net income, rents and profits thereof, or as much as may be necessary therefor, I direct to be applied in equal parts to the support, maintenance and education of my two children, George Field and Mary Rebecca, until they shall respectively attain twenty-one years of age, and upon their respectively attaining twenty-one years of age, then to pay over to each child, after so attaining that age, the net income, rents and profits of one-half of said estate for his and her sole use and benefit during their respective lives, and after their deaths respectively, the respective shares of said estate set apart for them as above directed shall go to and belong to their heirs-at-law and next of kin, respectively, in the same manner as though they were respectively absolute owners of the same.

"In case of the death of either of my children before attaining lawful age and without issue, I direct the share set apart for the benefit of the one so dying to be applied to the use and benefit of the survivor in the same manner as is before provided in respect to their own share, but if the one so dying shall leave issue, then such issue shall be entitled to the same.

"In case of the death of both my children before attaining lawful age and without issue, then upon the death of the longest liver, I direct said property to be disposed of as follows:

"Out of the same, I direct that my brothers, M. Augustus and William, or in case of the death of them or either of them, their respective issue shall be paid one thousand dollars each, that is to say, one thousand dollars to M. Augustus, or in case of his death, that sum to his issue, in equal shares, and one thousand dollars to William in the same way. And the

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balance I direct to be divided into equal shares amongst my several brothers and sisters, including M. Augustus and William, and in case of the death of any of them leaving issue, then such issue shall take the part the parent would have taken, if living.

"Should my executors and trustees, in the exercise of their best judgment, deem it prudent and for the true interest of my children, after they respectively attain lawful age, to make over to them, or either of them, any part of the principal of the estate before referred to, I authorize them to do so to the extent of the one-half part (or less) of the share set apart for their benefit, respectively, that is to say, to the extent of one-quarter of the whole estate, if both be living, or one-half in case one be dead, and if the conduct or situation of either of my said children, after he or she shall have attained thirty years of age, shall warrant it, and my executors and trustees shall, in the exercise of a sound judgment, deem it for their true interest, then I authorize them to make over to them or either of them, the balance or any portion of said estate set apart for their benefit as above."

George C. Genet for appellants. The trustees in the first deed of trust did not take the whole fee. Their estate was limited to collecting the rents, and, therefore, to so much of the fee of the estate as was necessary to enable them to perform this duty. The remainder and the reversion or fee remained in Mrs. Riggs. (*White v. Howard*, 46 N. Y. 144; *Douglas v. Cruger*, 80 id. 18; *Gilbert v. Deshon*, 107 id. 324; 2 Wash. on Real Property, 388, 389; *Curtis v. Leavitt*, 15 N. Y. 129; 1 R. S. 729, § 60; *Orook v. County of Kings*, 97 N. Y. 446, 451, 453; *Embury v. Sheldon*, 68 id. 227; *Stevenson v. Lesley*, 70 id. 512; *Outting v. Cutting*, 86 id. 535; *Cook v. Platt*, 98 id. 35; *Welch v. Bernheimer*, 105 id. 470; *Chamberlain v. Taylor*, id. 102.) Where a person has a right to make a trust, he has a right to regulate its nature and extent, even to the reservation of a power of revocation. (*Gilman v. McArdle*, 99 N. Y. 457; *Belmont*

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v. *O'Brien*, 12 id. 404; Story's Eq. §§ 972, 1036, b 1196.) The whole legal estate was not vested in the trustees, so as to defeat Mrs. Riggs' right to make this will and create these trusts. (Story's Eq. § 1380; *Lang v. Ropke*, 5 Sand. 363; *Wadhams v. Home Missionary Society*, 2 Kern. 415, 419; *Strong v. Skinner*, 4 Barb. 546; *Corn Ex. Ins. Co. v. Babcock*, 42 N. Y. 638; *Johnston v. Spicer*, 107 id. 195.) By the death of the testatrix the trust ceased, if any ever existed, and those to whom she devised her property took it subject only to the new trusts imposed upon it by her will. (*Clark v. Jaques*, 1 Beav. 36; *Harvey v. Harvey*, 1 P. Wms. 125; *Gruby v. Cox*, 1 Ves. 718; *Essex v. Atkins*, 14 id. 527, 542; *White v. Howard*, 46 N. Y. 144; *Crooke v. County of Kings*, 97 id. 451, 452; *Bailey v. Bailey*, 97 id. 460.) The illegality of a part of a will does not invalidate any other part that can stand alone. (*Manice v. Manice*, 43 N. Y. 785.)

Ernest H. Crosby for guardian *ad litem* of Alice Hunt, infant defendant. The trust estate terminated at the moment of Mrs. Riggs' death. The trustees could collect rents no longer. The requirement of a conveyance by the trustees is immaterial. (*In re Livingston*, 34 N. Y. 555, 567; 2 R. S. § 67, art. 2, tit. 2, chap. 1.) The trusts contained in Mrs. Riggs' will are to be construed as dating from the time of her death. (2 R. S. tit. 2, art. 2, chap. 1, §§ 61, 62.)

Franklin B. Lord for respondents. The heirs would take as purchasers and not by descent from Mrs. Riggs, and the limitation in the deed created a remainder and did not reserve a reversion. (*Bryan v. Knickerbocker*, 1 Barb. Ch. 409; 5 Bacon's Abr. 730; *Reading v. Royston*, 2 Id. Ray. 826; Gray on Perpetuities, § 112; *Noyes v. Blakeman*, 2 Selden, 567; *Yale v. Dederer*, 18 N. Y. 267; Reviser's note to § 55, tit. 2, chap. 1, pt. 2 R. S.; Sugden on Powers [8th Eng. ed.] 214; R. S. [7th ed.] 2191, art. 3, § 105; Id. 2189, art. 3, § 85; Id. 2176, art. 1, § 14; Id. 2193, art. 3, § 120.) No one can give another power to do a thing which he cannot do himself, and

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a power of appointment created by a deed must be limited to the creation of such estates as the donor of the power could lawfully have created by the deed. (*Salmon v. Stuyvesant*, 16 Wend. 324; *Robinson v. Hardcastle*, 2 T. R. 251; 4 Kent's Com. 337; *Thomson v. Livingston*, 4 Sand. 539; *Morgan v. Gronow*, L. R., 16 Eq. 1; *Powell's Trusts*, 37 L. J. Ch. 188.) If an absolute power to appoint by deed or will is given, the donee of the power is practically the owner and can, by an exercise of the power, vest the fee in himself, but if the power is to be exercised only by will, this is not the case. The donee of the power cannot then, during his life, dispose of the property irrevocably. (Gray on Perpetuities, 526, § 534; Marsden on Perpetuities, 250.) A power of this character does not avoid the suspension of the absolute power of alienation. (Gray on Perpetuities, 335, § 527.) The property conveyed by the marriage settlement must be held to be vested in Mrs. Riggs' children by virtue of the limitation in default of appointment. (Gray on Perpetuities, 337, § 534.) Such a deed while, perhaps, vesting the legal title in the trustee, would leave the equitable title in the married woman, and she would be able to dispose of the property without the concurrence of the trustee, unless expressly restrained by the terms of the deed. (*Jacques v. Methodist Church*, 17 Johns. 543.)

ANDREWS, J. The question presented on this record is whether the trusts created by the will of Caroline M. Riggs, dated June 27, 1867, are valid within the law of perpetuities, or are void for remoteness. There can be no doubt that if the testatrix, at her death, was the absolute owner of the estate embraced in the trusts, they were valid both in respect of their purposes and duration. In general character they are trusts to apply the rents, profits and income of the trust estate for the support and maintenance of two children of the testatrix during their lives, respectively, with remainder on the death of either, of the share of the one so dying, to his heirs and next of kin, except that in case of the death of either child during minority and without issue, the whole estate is to

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be held in trust for the survivor during life, with remainder to his heirs and next of kin; and in case of the death of both children during minority and without issue, then, on the death of the longest liver, the whole estate is given absolutely to designated beneficiaries. Under the will the estate was to vest in absolute ownership, at the furthest, within the compass of the lives of the two children. The share of each child, provided he attained majority, would be liberated from the trust on his death, and the suspension of that share would, in that event, be but for one life only. But if either child should die during minority without issue, there would be a further suspension of the absolute ownership of his share during the life of the survivor. As to each share, therefore, there might be a suspension for two lives, but this would be within the limit allowed by law. The statutory limit of suspension of the power of alienation of real estate is two lives in being at the creation of the estate and a minority (1 R. S. 723, § 15), and substantially the same rule applies to limitations of personal property. By another section of the statute (§ 41) it is declared that, "the delivery of the grant where an expectant estate is created by grant, and where it is created by devise, the death of the testator shall be deemed the time of the creation of the estate." There would be no difficulty in sustaining the limitation in the will, if the period of suspension is reckoned from the death of the testatrix.

It is claimed, however, in behalf of the respondents, that the will of Mrs. Riggs was merely an execution of a power of appointment reserved in the trust deed of January 6, 1853, made between the testatrix (then Caroline M. Field), of the first part, and George S. Riggs and others, of the second part, and not an exercise by her, as owner of the property, of the *jus disponendi* incident to ownership, and that the trusts created by the will were void under the statute of powers (1 R. S. 732), for the reason that they were limited upon the lives of persons not in being at the creation of the power, viz., upon the lives of the two children of the testatrix, who, though living when the will was made, were not born until long after

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the trust deed creating the power had been executed. By section 128 of that statute it is declared that "the period during which the absolute right of alienation may be suspended by an instrument in execution of a power shall be computed not from the date of the instrument, but from the time of the creation of the power." Section 129 declares that "no estate or interest can be given or limited to any person by an instrument in execution of a power, which such person could not be capable of taking under the instrument by which the power was granted." And by section 105 it is declared, in substance, that a power reserved is subject to the provisions of the article in the same manner as a power granted.

The trust deed was made in contemplation of the marriage of the settlor, Caroline M. Field, with George S. Riggs. Its leading purposes were to secure to the settlor the income of her property for her own benefit during the marriage, free from the control, disposition, debts or incumbrances of her husband, and to secure the principal to her if she survived her husband, or in case she should die during coverture, to her appointees by will, or if she should make no appointment, to such persons as at her death would be her heirs under the laws of New York, as if all the property was real estate. To secure these objects the settlor conveyed by the trust deed to the trustees, all her real and personal estate in trust, to receive and apply the rents, issues, profits and income to her use as received, without power of anticipation during her coverture, and in case she survived her coverture, to reconvey the property to her; but in case she should die during coverture, then the trustees are directed to "grant, assure and deliver all and whatever may remain of the hereby granted premises unto such devisee or devisees, in such share or proportion as she, the said party of the first part, by her last will and testament, may direct, which will and testament," the instrument declares, "she, the said party of the first part, is empowered, authorized and enabled to make, and by force of these presents, without any other or further reservation of power in that behalf," etc. Then follows an

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alternative provision that in default of appointment, the property shall "go unto such person or persons living at the death of the said party of the first part, and being her heir or heirs-at-law, as would be entitled to take the same by descent from her in case the same was land belonging to her situate in the state of New York, and if more than one person, then in the proportion in that behalf prescribed by the laws of said state.

The trust deed created a valid trust for the joint lives of Mrs. Riggs and her husband, or during coverture, if she should become discoverd by the death of her husband before her death. It was one of the express trusts authorized by statute to receive the rents and profits of lands and apply them to the use of any person during the life of such person, or for a shorter period (1 R. S. 728, § 55, subd. 3), and suspended the power of alienation of the real estate and the absolute ownership of the personal property embraced in the trust, during the trust term, and although the trust might have terminated before the expiration of Mrs. Riggs' life by the death of her husband in her lifetime, the suspension was, in legal effect, a suspension during a life. Neither she alone, or in conjunction with the trustees, could abrogate the trust. The statute makes every conveyance or other act of the trustees of an express trust in lands, in contravention of the trust, absolutely void, and, by analogy, the same rule governs trusts of personal property. (1 R. S. 730, § 65; *Graff v. Bonnett*, 31 N. Y. 9; *Campbell v. Foster*, 35 id. 361.) The will further provides, in a contingency, for the suspension of the power of alienation and the absolute ownership of at least one-half of the same property during the lives of the two children of the testatrix, making possible a suspension for three lives, if the trust created by the trust deed and the trusts created by the will are to be read as if incorporated in a single instrument, viz., the trust deed of 1853.

If Mrs. Riggs remained the absolute owner of the property after the execution of the trust deed, subject only to the estate of the trustees for her life, the trusts in the will would be valid. The reversion in the case supposed would be property which

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she could grant or devise, and limit future estates thereon in her discretion, subject only to the restriction that they must vest in absolute ownership within two lives in being at their creation. But Mrs. Riggs was not the absolute owner of an estate in reversion, after the execution of the trust deed. In form the whole estate was conveyed to the trustees. Their title, however, was, in legal effect, limited in point of duration to the trust term. (*Stevenson v. Lesley*, 70 N. Y. 512; *Crooke v. Co. of Kings*, 97 id. 451.) But the trust deed itself contains a limitation of the estate to other persons than Mrs. Riggs in the event of her death before her husband, and without having made an appointment by will, viz., to such persons living at her death as would take the property as her heirs under the laws of the state of New York by descent, as if it was wholly real estate.

The property transferred by the trust deed was mainly personal, but at the time of Mrs. Riggs' death was mainly real, the trustees having, under the authority of the deed, invested the fund to a large extent in real estate situate in New York and Maryland. The remaindermen, in case the event happened upon which the remainder was limited, would take as purchasers. It was limited to persons who would not be entitled, as of course, to the personal estate, and who might not be entitled to the real estate outside of New York, and whose title would not be subject to the tenancy by the curtesy of the husband, as it would have been if the deed had not been made. (See *Reading v. Rawsterne*, 2 Ld. Raymond, 828.) It is true 9/ that the remainder might be defeated by either of two events; the death of Mrs. Riggs before the death of her husband, or 1 by her will made in execution of the power of appointment and taking effect during his life, and it was in fact defeated in the latter way. But Mrs. Riggs could not during the life of her husband affect the limitation in remainder, except in the particular way pointed out, that is by an appointment by will. She could not defeat it by a conveyance *inter vivos*. The quality of absolute property, which enables an owner to dis-

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pose of it in any of the forms known to the law, did not attach to the interest remaining in Mrs. Riggs after the execution of the trust deed. What she did have was a reversion depending on the event of her outliving her husband, which has been defeated by her death, and in addition a right to appoint by will only in case of her death during coverture. It is a doctrine of the common law that an unrestricted power to appoint a fee in lands by deed or will is equivalent to ownership, because the donee of the power may at any time, by exercising the power, acquire an absolute estate, and for this reason the question of perpetuity arising upon limitations made by the donee of such a power is determined with reference to the date of the execution of the power and not of the instrument creating it. (Sugden on Powers, vol. 1, page 469 *et seq.*) But the general rule is expressed by Chancellor KENT in his Commentaries (Vol. 4, page 337): "An estate created by the execution of a power takes effect in the same manner as if it had been created by the deed which raised the power." The power of disposition reserved by Mrs. Riggs in the trust deed was not an absolute power equivalent to absolute ownership. It was restricted to a disposition by will. The statute of powers (§ 85) defines an absolute power to be one by which the grantee is enabled in his lifetime to dispose of the entire fee for his own benefit. The power in this case, under the definition in our statute, was general, but not absolute. (*Cutting v. Cutting*, 86 N. Y. 535.)

We think the validity of the suspension in the will of Mrs. Riggs is to be determined by the test whether it would be valid if it had been part of the limitation in the trust deed and had been inserted therein at the time the deed was executed. This seems to be the rule of our statute and it is the rule of the common law in respect to appointments under special powers, but not as to appointments under general or absolute powers. Mr. Jarman, in referring to this subject, says that the reason that this test is not applicable to appointments under general powers is that such powers are, in point of alienation equivalent to actual ownership, but he adds: "This

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reason fails when the power, though general in its objects, is to be exercised by will only. In such a case the power of disposition is suspended during the life of the donee, and appointments made by virtue of it are, therefore, to be tested in the same way as appointments under a special power." (1 Jar. [5th ed.] 291.) The case of *Re Powell's Trusts* (39 L. J. Ch. 188), decided by JAMES, V. C., cited by Mr. Jarman, fully sustains the text. The case of *Rouse v. Jackson* (L. R. 29, Ch. Div. 521) seems to be adverse, but it proceeded, I think, on a failure to discriminate between a general and unrestricted power and one to be exercised by will only, and this is the view taken by Mr. Gray in his work on Perpetuities (§ 526); see, also, Marsden on Perpetuities (p. 250). Construing the trusts in the will of Mrs. Riggs as if created at the date of the trust deed of 1853, they are invalid as they provide for a possible suspension of the power of alienation of real estate and the absolute ownership of personal property for three lives, and for the additional reasons that the two children, upon whose lives the trusts in the will are limited, were not in being when the trust deed was executed, and could not have taken such an estate as was limited under the will, if it had been limited in the same manner in the deed of 1853.

The argument is urged that, conceding that the absolute power of alienation of the trust estate was suspended during the coverture of Mrs. Riggs under the general rule, by reason of the disability imposed by the statute upon the trustees to do any act or make any conveyance in contravention of the trust, this disability was removed as to property held in trust for married women, by the married woman's act of 1848, as amended by the second section of the act of 1849. That section provides that any person who may hold any real or personal property as trustee for any married woman may, on her written request, convey the same to her, or the rents, issues or profits thereof, for her "sole and separate use and benefit," but it is made a condition to such conveyance that the request shall be accompanied by a certificate of a justice of the Supreme Court that "he has examined the condition

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and situation of the property and made due inquiry into the capacity of the married woman to manage and conduct the same." This statute does not, we think, answer the difficulty. Assuming that the trust in this case was within the statute of 1849, the disability imposed upon a trustee of an express trust by the general statute, is not removed in the case of a trustee for a married woman, except conditionally, the condition being the judicial action of a judge certifying, after an examination of the facts, that it is a proper case for the exercise of the power conferred by the act. In substance, the statute confers a power dependent upon the consent of a judge of the court. Until such consent is obtained the suspension continues. It could not be terminated by the conjoint action of the trustees and Mrs. Riggs. The general test of alienability is that there are persons in being who can make a perfect title. This cannot be predicated, we think, of a situation where judicial action, which may or may not be obtained, is requisite to authorize a conveyance. (See Gray on Perpetuities, § 527.) But, independently of this consideration, we think the statute was intended to apply merely to nominal trusts to secure a married woman in the enjoyment of her separate estate, where this was the sole object of the trust. The statute in such a case permits the trust to be abrogated and the legal title to be vested in the beneficial owner, the separation of the legal and equitable estates no longer serving under our statutes any useful purpose. It certainly cannot be construed to prevent a parent, relative or other person from creating an express trust to apply the rents and profits of the trust estate for the benefit of a married daughter, niece or other female without subjecting it to the risk of destruction by the conjoint action of the trustee, the beneficiary and the court. The trust created by the deed of 1853 was not a mere formal or passive trust. The title to the property was vested in the trustees. It was strictly a trust under the statute. The deed not only declared the interest of Mrs. Riggs in the trust property, but limited thereon future contingent estates to take effect on her death during coverture, unless defeated by her appointment by will. This trust was

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not, we think, within the purview of the statute of 1849. If a conveyance had been made to her under that statute, the property would not be held "for her sole and separate use and benefit," because the contingent estate in remainder could not in that way be defeated. (*Bryan v. Knickerbocker*, 1 Barb. Ch. 409; *Wright v. Tallmadge*, 15 N. Y. 315.) We think the court below properly construed the will, and the judgment should, therefore, be affirmed.

EARL, FINCH and PECKHAM, JJ., concur; DANFORTH and GRAY, JJ., dissent on the ground that the fee did not pass to the trustees by the deed. They took no greater estate under it than was sufficient for them to perform the duties stated. The remainder, or reversion, remained in the grantor. The will was not in the execution of any power, and there is, therefore, no contravention of the statute against unlawful perpetuities in the trust provisions of the will. RUGER, Ch. J., does not vote.

Judgment affirmed.

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In the Matter of Compelling Payment of Tax upon Property
Given by the Will of HANNAH ENSTON, Deceased.

Property within this state, which passed by will or intestacy from a non-resident decedent to collateral relatives or strangers, was not taxable under the "Collateral Inheritance Act" (Chap. 483, Laws of 1885), prior to its amendment in 1887 (Chap. 713, Laws of 1887). That act only applied to property so passing "from any person who may die seized or possessed of the same while being a resident of the state" and to property within the state owned by a resident and transferred, *inter vivos*, to take effect at the death of the transferor. (DANFORTH and FINCH, JJ., dissenting.)

(Argued January 28, 1889; decided April 16, 1889.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made July 1, 1887, which affirmed an order of the surrogate of the county of Kings imposing a tax under the act (Chap. 483, Laws of 1885.)

The material facts are stated in the prevailing opinion.

Josiah T. Marean for appellants. The legislature intended to exempt from the collateral inheritance tax estates of non-residents, whether real or personal, passing by will or intestate laws. (1 R. S. 389, § 5; Laws of 1851, chap. 176, § 2; 1 R. S. 419, § 3; *Williams v. Bd. of Suprs.*, 78 N. Y. 561, 565, 566.) The collateral inheritance tax law imposes a tax upon the right to succeed by virtue of our laws. (*Scholey v. Rew*, 23 Wall. 331; *Eyre v. Jacobs*, 14 Gratt. 422; *Pullen v. Wake*, 66 N. C. 361; *Moultrie v. Hunt*, 23 N. Y. 394; *Parsons v. Lyman*, 20 id. 103; Code, § 2694; 55 Geo. 3, chap. 184, pp. 564, 565; 16 and 17 Vic. chap. 51, p. 440; 13 U. S. Stat. at Large, 285, 287; *Orcutt's Appeal*, 97 Penn. St. 185, 186; *Thompson v. Advocate General*, 12 C. & F. 1; *Wallace v. Atty.-Genl.*, 1 L. R. Ch. 1; *U. S. v. Hunnewell*, 13 Fed. Rep. 617; *Atty.-Genl. v. Napier*, 6 Exch. 217.) It is for the legislature to determine what classes of objects shall be submitted to the unequal burden, but in the construction of their acts the presumption is always in favor of the narrower rather than the wider limit of that inequality. (Cooley on Taxation [2d ed.] 267, 275; *Warrington v. Furber*,

113	174
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137	407

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8 East, 245; *Denn v. Diamond*, 4 B. & C. 244; *Tompkins v. Ashby*, 6 id. 543; *Doe v. Snaith*, 8 Bing. 152; *Wroughton v. Turtle*, 11 Mees. & W. 567; *Marquis v. Commissioners*, 6 Exch. 479; *Gurr v. Scudds*, 11 id. 192; *Green v. Holloway*, 101 Mass. 248; *Smith v. Waters*, 25 Ind. 399; *Cahoon v. Coe*, 57 N. H. 557; *U. S. v. Wiggleworth*, 2 Story, 373; *Powers v. Barney*, 5 Blatch. 203; *U. S. v. Watts*, 1 Bond. 583; *People v. Davenport*, 91 N. Y. 591; *In re Miller*, 110 id. 222.) Personal property, consisting of evidence of debt and of shares in foreign corporations, as in this case, ought not to be held to be property within this state within the meaning of this act. (*Orcutt's Appeal*, 97 Penn. St. 185, 186; *People v. Smith*, 88 N. Y. 580; *Peterson v. Chemical Bk.*, 32 id. 21.)

John F. Olake for respondent. It has been the uniform policy of legislation to make all exemptions from taxation clear and explicit. They are to be clearly expressed, and never presumed or implied. (*Burr. on Taxn.* 132; *Cooley on Taxn.* 146; *Hilliard on Taxn.* 72, 74; *Law of Assess.* [D. W. Welty] 305; *Mayor, etc., v. C. R. & B. C.*, 50 Ga. 620; 2 R. S. 981, 982, *Laws of 1882*, chap. 46; *Laws of 1883*, chaps. 397, 406; *Laws of 1852*, chap. 282; *Laws of 1884*, chap. 537; *Laws of 1847*, chap. 133; *Laws of 1851*, chap. 122; *Laws of 1867*, chap. 516; *Laws of 1865*, chap. 546; *Laws of 1856*, chap. 183; *Laws of 1866*, chap. 273; *Laws of 1879*; chap. 210-250.) The words "who may die seized or possessed of the same while being a resident of the state" in the collateral inheritance act, instead of implying an action, are expressive and declaratory of an additional case in which the tax is to be imposed. (*Hoyt v. Comrs. of Taxes*, 23 N. Y. 224.) The tax sought to be recovered in this matter is upon property within this state passing by will and, therefore, is within the terms of the act, chapter 483, *Laws of 1885*. (*Thompson v. Adv.-Genl.*, 12 C. & F. 1; *Wallace v. Attorney*, L. R., 1 Ch. Div. 1; *U. S. v. Hunne-well*, 13 Fed. Rep. 617.)

ANDREWS, J. Hannah Enston died at Spartensburgh, South Carolina, on the 26th day of October 1886. At the time of

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her death she was a resident of Philadelphia in the state of Pennsylvania, and she had never been a resident of or domiciled in this state. She left a last will and testament which was admitted to probate in the Surrogate's Court of Kings county. She had an estate amounting to about one million dollars, which by her will she disposed of to her collateral relatives and to strangers in blood. One of her executors resided in the county of Kings and the other at Philadelphia; and all the legatees but one were non-residents of this state. Nearly all her property was invested by her agents, residing in the city of Brooklyn, and was managed by them. After making certain deductions there was left, as held by the surrogate, for the purposes of taxation under the act, chapter 483 of the Laws of 1885, \$843,541.11, consisting of the following property: Real estate situate in the county of Kings, \$125,575; bonds secured by mortgages upon real estate in the state of New York, \$471,650, and promissory notes and bonds of municipal corporations, and stocks and bonds of other and foreign corporations, \$246,316.11. Upon this property the surrogate made an order directing the executors to pay a tax of \$42,107.05. From the order of the surrogate the executors appealed to the General Term where the order was affirmed, and they then appealed to this court.

It is not questioned that this tax would have been proper under the act referred to, if Mrs. Enston had, at the time of her death, been a resident of this state. But her executors claim that as she was not a resident of this state, there is no law imposing or requiring payment of this tax.

For the purpose of determining whether this tax was properly exacted, we must construe section 1 of the act of 1885, as that section is the only one which describes the property to be taxed under the act, and it is as follows: "Section 1. After the passage of this act, all property which shall pass by will or by the intestate laws of the state, from any person who may die seized or possessed of the same while being a resident of the state, or which property shall be within this state, or any part of such property, or any interest

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therein, or income therefrom, transferred by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor to any person or persons, or to any body politic or corporate, in trust or otherwise, or by reason whereof any person, or body politic or corporate shall become beneficially entitled, in possession or expectancy, to any property or the income thereof other than to or for the use of father, mother, husband, wife, children, brother and sister and lineal descendants, born in lawful wedlock, and the wife or widow of a son, and the husband of a daughter, and the societies, corporations and institutions now exempted by law from taxation, shall be, and is subject to a tax of five dollars on every hundred dollars of the clear market-value of such property, and at and after the same rate for any less amount, to be paid to the treasurer of the proper county, and in the city and county of New York to the comptroller thereof, for the use of the state, and all administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed; provided that an estate which may be valued at a less sum than five hundred dollars shall not be subject to said duty or tax."

The section is singularly involved and obscure in its phraseology, and the precise legislative intent is very far from being clear. But we must meet the difficulties which the section presents as well as we can, and by a fair construction of the language used give effect to what we believe to have been the purpose of the legislature. The tax imposed by this act is not a common burden upon all the property or upon the People within the state. It is not a general but a special tax, reaching only to special cases and affecting only a special class of persons. The executors in this case do not, therefore, in any proper sense, claim exemption from a general tax or a common burden. Their claim is that there is no law which imposes such a tax upon the property in their hands as executors. If they were seeking to escape from general taxa-

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tion, or to be exempted from a common burden imposed upon the People of the state generally, then the authorities cited by the learned counsel for the People, to the effect that an exemption thus claimed must be clearly made out, would be applicable. But the executors come into court claiming that the special taxation provided for in the law of 1885 is not applicable to them, or the property which they represent. In such a case they have the right, both in reason and in justice, to claim that they shall be clearly brought within the terms of the law before they shall be subjected to its burdens. It is a well-established rule that a citizen cannot be subjected to special burdens without the clear warrant of the law. The following authorities furnish the true rule applicable to such a case: *Cooley on Taxation* (2d ed. 275); *United States v. Wiggleworth* (2 Story, 373); *Powers v. Barney* (5 Blatch. 203); *United States v. Watts* (1 Bond, 583); *Doe v. Snaitth* (8 Bing. 152); *Green v. Holloway* (101 Mass. 248).

The section imposes a tax very plainly upon two classes of property: (1.) Upon all property which "shall pass by will, or by the intestate laws of this state, from any person who may die seized or possessed of the same while being a resident of the state." (2.) Upon property which shall be within this state transferred, *inter vivos*, to take effect at the death of the grantor or bargainor. It is claimed on behalf of the People that the words, "or which property shall be within this state," were added to the prior language, which included only property left by residents of the state, so as to include all property, whether owned at death by a resident or non-resident. If that had been the result sought by the draftsman of the act, it would have been easy in simple language to have covered all the property within the state which might pass by will or intestacy from any person whatever. If the construction claimed by the People be the correct one, then we have the peculiar feature that as to the second class provided for in the act (of property transferred, *inter vivos*, to take effect at death), instead of beginning with "all property," as was previously done as to the first class, we find the singular language, "any

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part of such property, or any interest therein, or income thereof, transferred," etc. Would any intelligent person have used such language to describe all property, or all the property of a certain class? We think the most obvious construction is, that the first class was intended to embrace all property passing by will or intestacy upon which it was intended to impose a tax, and that what immediately follows relates exclusively to property transferred within the state, *inter vivos*, and should be read consecutively as follows: "Which property shall be within this state, or any part of such property, or any interest therein, or income thereof, transferred by deed, grant, sale or gift," etc. The sentence could more properly have been constructed as follows: "Which property, or any part of such property, or any interest therein, or income therefrom, shall be within this state transferred by deed, grant, sale, gift," etc. The property meant by the words "which property" is not entirely certain. Its most natural meaning is the same property mentioned in the prior part of the section, and that had reference only to property owned by a resident of the state. As such transfers of property *inter vivos* are very rare in the transactions of men, it is probable that the purpose of that provision was to defeat an evasion of the statute by persons whose property had been made liable to taxation by the previous portion of the section, to wit, residents of the state. It is not probable that the draftsman had in contemplation that a non-resident of the state would come here and make a transfer of property *inter vivos*, to take effect at his death. There would be no occasion for him to do it as the previous portion of the section had imposed no succession tax upon the property which he, as a non-resident, should leave; and yet the broad language used may be so construed as to include transfers *inter vivos* made by both residents and non-residents; and for the purposes of this case it does not matter which of those two constructions be given to that portion of the section. We are, therefore, of opinion, in view of the inapt phraseology used, that there was no intention by that section to impose a succession tax upon

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property passing by will or intestacy from a non-resident of the state to his collateral relatives.

The People claim some support for their construction of section 1 from section 11, which reads as follows: "Whenever any foreign executor or administrator shall assign or transfer any stocks or loans in this state, standing in the name of a decedent or in trust for a decedent which shall be liable to such tax, such tax shall be paid to the treasurer or comptroller of the proper county on the transfer thereof, otherwise the corporation permitting such transfer shall become liable to pay such tax." It must be observed that that section imposes no tax. Section 1 does that, and it is upon that section alone that reliance can be placed for the exaction of the tax. But it is proper to look at section 11, so far as it may throw light upon section 1. There may be cases where all the executors or administrators are non-residents of the state, and, therefore, not within the jurisdiction of our courts; and such executors or administrators may assign or transfer stocks or bonds in this state, and provision is here made for the collection of the tax in such cases. Section 15 is also referred to, and that is as follows: "The Surrogate's Court in the county in which the real property is situate of a decedent who was not a resident of this state, or in the county of which the decedent was a resident at the time of his death, shall have jurisdiction to hear and determine all questions in relation to the tax arising under the provisions of this act." This section speaks of the real property of a non-resident decedent situate within this state. Hence the claim is made that the statute evidently contemplates that a tax may be imposed upon the real estate of a non-resident decedent. The section is very obscure. The draftsman evidently had in mind that there might be some case in which a non-resident decedent might leave real estate in this state which would be subject to taxation under the act. This section certainly can have no operation as it imposes no tax unless section 1 has imposed a tax in some case upon the real estate, within this state, of a non-resident decedent. An inference cannot be drawn from this section that section 1 authorizes the imposi-

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tion of any tax upon the personal property of a non-resident decedent, because the section is expressly confined to the real property of such a decedent, and unless such a decedent leaves real property within this state, no jurisdiction is conferred upon a surrogate to determine the questions in relation to the tax arising under the provisions of the act. But there might be a case if section 1 be construed to impose a tax upon all property transferred within this state, *inter vivos*, where the real estate of a non-resident situate within this state would be liable to the tax; and in this way some force and effect could be given to section 15. There is certainly nothing in this act imposing a succession tax upon the stocks, bonds and other choses in action left within this state by a non-resident decedent. It is a general rule of law that such property attends the owner and has its *situs* at his domicile. It is true that that is a fiction of the law, but it is a fiction which must prevail unless there is something in the policy of the statute or its language which shows a different legislative intent. (*People ex rel. Hoyt v. Commissioners*, 23 N. Y. 224; *People ex rel. v. Smith*, 88 id. 576.)

The corporate stocks of the decedent were not, under the general laws of this state, taxable here, although the share certificates may have been held here by her agents. The certificates are in no general sense property. They simply represent interests in the corporations, and the *situs* of the property owned by a shareholder in a corporation is either where the corporation exists or at the domicile of the shareholder; it can in no proper sense be said to be where the certificates happen to be in the hands of an agent in a state where the corporation has no existence and the owner no domicile. So, too, the bonds of foreign corporations in the hands of the agents of the decedent here were not, in a legal sense, property within this state, and they were not, under the general laws or the policy of the state, taxable here. On the contrary, they were, by the general policy of the state, exempted from taxation here. (1 R. S. 389, § 5, as amended by chap. 176 of the Laws of 1851, § 2; Id. 419, § 3; *Williams v. Bd.*

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of Suprs., 78 N. Y. 561.) There is nothing in the act of 1885 from which it can be inferred that the legislature meant so far to depart from its general system and policy of taxation as to impose here a succession tax upon property thus situated. It was dealing with taxation upon the property of persons domiciled here, and used language sufficient to impose taxation upon such property, but not upon property of non-residents which had no *situs* in this state. It cannot be presumed that it was the intention of the legislature to impose taxation upon all the property of any decedent found within this state. Suppose a foreigner should come here with negotiable securities in his possession for the purpose of buying property here, and soon after should die here. Or suppose a merchant should come here from some other state with negotiable drafts or securities in his possession and should die here shortly after reaching this state; can it be supposed in either of such cases that it was the legislative intent that before the property of the decedent could be taken out of this state to the jurisdiction of his domicile it should be subjected to a tax to enhance the revenues of the state? Then, again, if this act is to be so construed as to reach personal estate of non-resident decedents, how is it to be administered? There are no means of ascertaining here how much of the estate will pass to collateral relatives under a will or by intestacy. That can only be known after the entire expenses of administration and the debts and liabilities of the deceased have been ascertained and deducted at the place of his domicile. Suppose a non-resident dies, leaving \$1,000,000 in this state, and is largely indebted at the place of his domicile, what his net estate will be after deducting debts and expenses of administration can only be ascertained at his domicile, where his estate must be finally administered and adjusted, and there can be no way of adjusting the estate here, as there is no machinery in the law here appropriate to such a purpose; and thus it would be impractical to administer this statute. Still further, if a succession tax is demanded and paid here upon the property of a non-resident decedent, that does not

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answer a claim for a further tax at the place of the decedent's domicile; and thus his estate might, and many times would be, subjected to a double succession tax. There is, in the state of Pennsylvania, a law for the taxation of collateral inheritances like that which exists here, and if this estate be subjected to this tax in this state, it may again be subjected to a like tax in that state. All these considerations should lead us to hesitate to put upon section 1 such a construction as would bring within its purview the property of a non-resident decedent left in this state at his death. Upon some of the questions here discussed, the case of *Orcutt's Appeal* (97 Penn. St. 179), is an instructive authority. By chapter 713 of the Laws of 1887, section 1 of the act of 1885 was so amended as to subject to its operation the property within this state of a non-resident decedent, and this amendment furnishes some evidence that prior thereto the proper construction of the section, according to the understanding of the legislature, did not include within its operation such property.

We are, therefore, of opinion that the judgment of the General Term and the decree of the surrogate should be reversed and the proceedings dismissed, with costs in all the courts to the appellants.

DANFORTH, J. (dissenting). The question we have to determine is, whether the act of 1885 (*supra*) discloses an intent that property within this state, but belonging at the time of her death to a non-resident, shall be taxed under its provisions. I am of the opinion that such is its manifest purpose. The language of the first section takes in all property within the state which may be the subject of transmission by will, or, in case of intestacy, by statute, or of alienation by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor. The property subjected to taxation is the property within the state. The words used make it immaterial whether that property belonged to a resident or non-resident, so that its owner makes a testamentary

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disposition of it, or a disposition of that nature in whatever form it may be. This construction is most in harmony with the subject of the statute and with the general policy of the state in reference to taxation. In the construction of such statutes exemption is not favored (*People ex rel. Manhattan Fire Ins. Co. v. Board of Commissioners*, 76 N. Y. 64; *People ex rel. West. Fire Ins. Co. v. Davenport*, 91 id. 575), and whatever grammatical difficulties may stand in the way the intent of the legislature, if let out by its language, should be made effective. It may be, as the appellant claims, that no satisfactory conclusion can be reached by following the exact punctuation and philology of the separate clauses of the statute, but the language is not incapable of a reasonable meaning, and it is enough if its general scope and tenor furnishes sufficient light for a sensible interpretation not at variance with the words in which the design of the legislature has been clothed. Such is the case before us. It is conceded by the learned counsel for the appellant that the confusion thought to be apparent in the words of this act is cured by the amendatory act of 1887 (chap. 713).

The corresponding provisions as contained in that statute are: "After the passage of this act all property which shall pass by will or by the intestate laws of this state from any person who may die seized or possessed of the same while a resident of *this state or if such decedent was not a resident of this state at the time of death*, which property or *any part thereof* shall be within the state." The amendatory words are those in italics. They supply by explicit designation what was implied in the former act and facilitate the interpretation of the other clauses, but they are, nevertheless, superfluous. They are neither wider than the former words nor do they make the statute more comprehensive than it was originally, nor require a different meaning to be given to it. Under either statute the clear intention was to bring in for taxation all property, real and personal, without regard to residence, which was within the jurisdiction of the courts of this state and to be administered under its laws for the beneficiaries named in the

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act, subject only to the exceptions named in the act itself, and no reason can be gathered from the first section for any other limitation. Subsequent sections sustain the view I have presented. Section 11 regulates the conduct of foreign executors or administrators in reference to certain property of the decedent, and section 15 provides for priority of jurisdiction in case "of a decedent who was not a resident of the state," as well as over the estate of a decedent who at the time of his death was a resident.

Nor do I conceive there is any reasonable doubt as to the property upon which the tax should be levied. The appellant's contention is that, as to the personal securities, the residuum, after the payment of debts and other charges, should alone be assessed, and that the court of the decedent's domicile is the only one that can properly determine how much of them will go to the collateral beneficiaries. The power of the legislature to tax the succession of non-residents to property in this state is unquestioned. The property chargeable with the tax is defined with such clearness as to deprive the appellant's contention of all force. In the first place it is all property which shall pass (§ 1). (2d.) Its value in certain cases is to be appraised immediately after the death of the decedent, at what was the fair market-value thereof at the time of his death. (3d.) All taxes imposed by the act are made due and payable at the death of the decedent (§ 4), and the executors are given power to sell, not, it will be observed, the property actually subject to the distribution to the beneficiaries, but "so much of the property of the decedent as will enable them to pay said tax" (§ 7); and by section 8 they are required "within thirty days to pay over the tax retained by them to the comptroller of the city or the treasurer of the proper county, as the case may be." Other sections provide for the appraisal of the property of persons whose estates are subject to the payment of the tax, others to secure its payment, and so framed as to prevent injustice to the persons interested in the property. But the primary object of the law is the imposition of the

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tax and its prompt collection. To that end the executor is empowered to raise money by sale, and in case of stocks or bonds standing in the name of a decedent, or in trust for a decedent where a foreign executor assigns or transfers them, the tax must be paid on the transfer, or if he fails to do so, the corporation itself must pay the tax. The last provision as to payment by a corporation could, of course, only be enforced against a domestic corporation or one doing business within this state.

There is no danger, therefore, that any such securities can be effectually assigned or transferred by the executor until the statute is complied with, or that the payment of the tax may be so evaded. The condition of his assignee would be no better than his own. If erroneously paid (§ 10), or if debts are proven against the estate of a decedent after the payment of legacies or distribution of property from which the tax has been deducted, or upon which it has been paid, a just proportion of the tax is to be repaid. But the taxes are first, and at all events, to be paid or secured, and this is to be done if necessary from the very property of which the decedent was in her lifetime seized. The authorities cited from other states would seem from their language to stand upon a different statute. They cannot in any case affect the construction of our own.

The order appealed from applies only to real property and personal securities which, at the time of the death of the decedent, were within this state. It conforms to the statute now before us, and should be affirmed.

EARL, PECKHAM and GRAY, JJ., concur with ANDREWS, J.; FINCH, J., concurs with DANFORTH, J.; RUGER, Ch. J., does not vote.

Order reversed.

Statement of case.

THE YOUNG MEN'S CHRISTIAN ASSOCIATION OF THE CITY OF
NEW YORK, Respondent, v. THE MAYOR, ALDERMEN AND
COMMONALTY OF THE CITY OF NEW YORK, Appellant.

The Y. M. C. Association of the city of New York, incorporated under the act of 1866 (Chap. 350, Laws of 1866), is not a seminary of learning within the meaning of the statutory provision exempting from taxation buildings erected for the use of, and used by such institutions. (1 R. S. 368, § 4, sub. 3, as amended by chap. 397, Laws of 1883.)

Said association erected on lots owned by it on the Bowery a building, the basement of which contained a gymnasium, bowling alley and bath-room; above were twenty-two rooms, one of which only was devoted to purposes of public worship; and that was used also as a lecture hall. In an action to cancel a tax levied upon said premises, *held*, that they were not exempted from taxation under the general act (*supra*) exempting "every building for public worship" as the same is modified in its application to the city of New York by the "Consolidation Act" (§ 827, chap. 410, Laws of 1882), as it was not exclusively used for such purpose; and, in the absence of any special act exempting it, that the property was liable to taxation.

Y. M. C. A. v. Mayor, etc. (44 Hun, 102) reversed.

(Argued March 4, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made February 16, 1887, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought to have a tax assessed upon certain real estate belonging to plaintiff adjudged void and to have the same canceled of record and the defendant restrained from collecting the same.

David J. Dean for appellant. The plaintiff is not a "religious society" within the meaning of the statutes relating to taxation. (Laws of 1882, chap. 410, § 827; *Northwestern University v. People*, 86 Ill. 141; *Richmond Co. Academy v. Bohler*, 7 S. E. Rep. 633.) The plaintiff's property in the Bowery was not entitled to exemption by reason of its use. (*People v. Collins*, 18 N. Y. S. R. 125; 10 How. Pr. 139;

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Hebrew Free School Assn. v. Mayor, etc., 4 Hun, 446; *Assn. for Colored Orphans v. Mayor, etc.*, 38 id. 594; 104 N. Y. 584; Laws of 1827, chap. 228, §§ 3, 4, 5; 1 R. S. 458, § 24; R. S. [7th ed.] 1116, § 24.) These statutes should be strictly construed. (*People ex rel. v. Comrs.*, 95 N. Y. 557.)

Stephen P. Nash and Hubbard Smith for respondent. Plaintiff constitutes a religious society within the meaning of the statute. (*Hebrew Free School v. Mayor, etc.*, 4 Hun, 450; *Assn. for Colored Orphans v. Mayor, etc.*, 38 id. 593; 24 Daily Reg. 146; *People ex rel. v. Barber*, 32 Hun, 27; *People ex rel. Academy of Sacred Heart v. Comr. of Taxes*, 6 id. 109; *People ex rel. St. John's College v. Comr. of Taxes*, 10 id. 246.) If plaintiff constitutes a religious society, then the property should be considered exempt from the time it is divested of the character of property held in the market for the purpose of deriving a possible profit, and assumes the character of property that is devoted to purposes of public welfare. (*W. H. M. Church v. Mayor, etc.*, 20 Hun, 297; *St. James Church v. Mayor, etc.*, 41 id. 318.)

FINCH, J. The only question presented by this appeal is whether the Young Men's Christian Association, located in the city of New York, is liable to taxation upon the portion of its property in that city known as the Bowery Institute. No special act secures such exemption. By the terms of its original charter the corporation was shielded from taxation up to the limit of \$100,000 (Laws of 1866, chap. 350), but later the provision was amended so as to exempt all the real estate of the Association situated on the south-west corner of Twenty-third street and Fourth avenue so long as it should be exclusively used for the authorized purposes. (Laws of 1870, chap. 243.) The question, therefore, is to be determined by the provisions of the Revised Statutes as modified by the consolidation act of 1882 in their application to the city.

The general law, as amended in 1883, exempts "every building erected for the use of a college, incorporated academy or other seminary of learning, and in actual use for either of

such purposes, every building for public worship, every school-house, court-house and jail used for either of such purposes, and the several lots whereon such building so used are situated and the furniture belonging to each of them." The Consolidation Act (§ 827) makes these provisions inapplicable to any such building for public worship and any such school-house or other seminary of learning in the city of New York "unless the same shall be exclusively used for such purposes and exclusively the property of a religious society."

It is not impossible to characterize the Association as a religious society. Its objects, as described in its charter, are "the improvement of the spiritual, mental and social condition of young men in the city of New York." The means to be employed are "sermons, libraries, reading-rooms, social meetings" and other necessary incidents, among which are lectures, concerts and entertainments, bath-room and gymnasium, and instruction in penmanship, arithmetic, bookkeeping and drawing. The building contains above the basement, in which are the gymnasium, bowling alley and bath-room, twenty-two rooms, one only of which is devoted to purposes of public worship, and that not exclusively, since it is also used as a lecture hall. It is, perhaps, just to say that the general and primary purpose of the Association is to train up Christian men; to gather in the youth within its reach from temptation and ignorance and the surroundings of intemperance and crime, and cultivate their minds and hearts with a view to the belief and practice of a religious life. The promoters of the Association undoubtedly saw that some means must be used to draw the young men away from their associates and surroundings and bring them within its influence, and to accomplish this, amusement was blended with instruction and both made subservient to the ultimate end of bringing the membership under distinctively Christian influences. The purpose is excellent and the means adopted commendable; and if the statute allowed us to stop merely with a determination that the corporation is a religious society, we should deem that a reasonable conclusion. But the statute requires more. It provides

that the building must be exclusively used for purposes of public worship, or exclusively used for those of a seminary of learning. I do not understand that either the courts below which adjudged the exemption claimed, or the learned counsel who argued the case at our bar in behalf of the respondent, deemed the corporation a "seminary of learning" within the meaning of the statute. That phrase includes academies, and describes institutions of learning, for either sex, of a similar character. They are subject to the visitation of the regents, are required to report to them, and are permitted to share in the income of the literature fund. (2 R. S. [7th ed.] 1116, §§ 23, 24, 29.) The Young Men's Christian Association was not incorporated as a seminary of learning and does not answer that description. Unless, therefore, it can be truthfully and correctly said that its building is exclusively used for purposes of public worship, it can have no exemption from taxation upon its Bowery Institute. There is no ambiguity in the phrase "public worship." It refers to the usual church services upon the Sabbath, open freely to the public and in which anyone may join. (*Assn. for Colored Orphans v. Mayor, etc.*, 104 N. Y. 581.) There are such services held in the building of the Association, but in comparison with the other uses to which that building is put they are the least of all, not, perhaps, in their importance, but in the time which they occupy and the proportion of the building which they require. At all events, it cannot be properly said, upon the facts disclosed, that the building is used exclusively for purposes of public worship. Associations of this character are so useful and so deserving of encouragement and support that a different result would please us better, but we are unable to reach it under the law as it stands.

The judgment of the General and Special Terms should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

AARON N. NEWCOMB, as Executor, etc., Appellant, v. EDWARD WEBSTER, as Executor, etc., et al., Respondents.

While, as a general rule, a will and codicil are to be construed as parts of the same instrument, and a codicil is no revocation of a will further than it is so expressed, where the codicil contains dispositions, inconsistent with provisions of the will, the latter will be deemed revoked to the extent of the discordant dispositions, and so far as may be necessary to give effect to the provisions of the codicil.

After the making of her will, the testatrix sold the principal real estate devised and acquired other real estate. She thereafter executed a codicil which, after providing for beneficiaries named in the will without any reference, however, to it, and also for new beneficiaries, gave all the rest and residue of her estate, real and personal, to certain beneficiaries named. It, by express provision, revoked so much of the will as was inconsistent with the codicil. In an action for the interpretation of the instruments, *held*, that all of the provisions of the will, save the clause appointing executors, were revoked by the codicil; but that, as said clause remained in force, both instruments were properly admitted to probate.

(Argued March 4, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 21, 1887, which affirmed a decision entered upon a decision of the court on trial at Special Term.

This action was brought to obtain a judicial construction of a will and codicil.

It appeared that Angelina B. Walker died on the 7th of June, 1884, leaving real and personal property in Monroe county; that by her will, dated April 23, 1881, she, by its first clause, gave to her sister Olive, for life, house No. 89 Frank street; remainder to Mrs. A. B. Johnson, Mary A. Hatch and Milicent J. Johnson. By the second clause, to Anna Newcomb, for life, house and lot No. 14 Spencer street; remainder to the surviving children of Anna.

Third. She directed house No 89½ Frank street to be sold, and its proceeds applied in part to the erection of a monument

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on "my lot in Mt. Hope;" \$100 to the Mt. Hope commissioners to keep the same and lot in order, and the residue, "to Emeline Soper, William Springstead, Hubert Herrick, Nelly Soper, Frances Spencely and Elliott Hodges, of Rochester, N. Y., share and share alike, after first paying \$100 each to Mrs. Rose Chrichton, of Rochester, N. Y., and to Charles P. Hodges, of Cleveland, Ohio, which I bequeath to them. The legacy of William Springstead to be deposited in the Monroe County Savings Bank and paid over with its accumulations when he arrives at twenty-one years of age."

Fourth. Directs No. 102 Jones street to be sold and proceeds to be divided between the six children of George Walker.

Fifth. She gives her piano to Robert P. Newcomb, son of Anna L. Newcomb, and all her household furniture and household goods and effects to her nieces, Mrs. Adelia Johnson, Mary Hatch, Anna Newcomb, Ida Springstead, of Rochester, and Minerva Herrick, of Watertown, N. Y., and also all residuary interests and estate, and finally appoints Aaron N. Newcomb and Edward Webster executors of the will, with power to sell and convey real estate. It further appeared that in the year 1882 she sold lot 14, referred to in the second clause of the will, and also No. 102 Jones street, referred to in the fourth clause. Afterwards, in 1884, she executed an instrument in these words:

"I, Angelina B. Walker, of the city of Rochester, county of Monroe and state of New York, do make, publish and declare this first codicil to my last will and testament, hereby revoking so much of my said last will and testament as is inconsistent with the provisions of this codicil.

"*Item First.* I direct one hundred dollars to be set aside and paid over to the commissioners of Mount Hope as a perpetual fund, the interest of which shall be annually expended to keep the lot in said Mount Hope belonging to my late husband Robert Walker and my brother Perry Hodges.

"*Second.* I give and bequeath to the Rochester Home for the Friendless one hundred and fifty dollars.

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"*Third.* I give and bequeath to the Frank Street (otherwise Sixth) Methodist Episcopal Church of Rochester, to be expended by the trustees thereof towards erecting a parsonage for the use of their pastor, the sum of five hundred (\$500) dollars.

"*Fourth.* I give and bequeath to the Rochester Orphan Asylum three hundred dollars, to be expended for the rearing and education of an orphan, Belle Peer by name.

"*Fifth.* I give and bequeath to Hubert Herrick, of Rochester, five hundred dollars, to be placed on interest in the Monroe County Savings Bank, paid over to him on arriving at twenty-one years of age; if he shall die before that date, then said legacy shall go to his mother, Minerva Herrick.

"*Sixth.* I give and bequeath to my sisters, Emeline Soper, and Olive J. Hatch, each the sum of five hundred (\$500) dollars.

"*Seventh.* I give and bequeath to the six (6) children of my brother-in-law George Walker, each the sum of two hundred (\$200) dollars.

"*Eighth.* I give and bequeath to my four nieces, Mrs. Anna Newcomb, Frances Spencely (of Canada), Adelia B. Johnson and Mary N. Hatch, all the rest, residue and remainder of my estate, both real and personal, to be divided equally between them, and share and share alike."

The trial judge found "that no part of said will is revoked by said codicil, except the second and fourth clauses thereof and the residuary devise in the fifth clause of said will, but that all other legacies and devises in said will and codicil ought to be carried into effect."

Further facts appear in the opinion.

D. C. Barnum for appellant. An entire disposition of an estate by a codicil is inconsistent with a prior will disposing of the same estate, and the will is revoked by it. (*Hutchinson v. Hutchinson*, 2 L. J. [N. S.] 14; *Barlow v. Coffin*, 24 How. Pr. 54; *Larrabee v. Larrabee*, 28 Vt. 274; *Bedloe v.*

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Homer, 16 Gray, 432; *Holder v. Howell*, 8 Vesey, 100; *Beardsley v. Selectmen*, 53 Conn. 489; 3 Atl. Rep. 557; *Kermode v. McDona'd*, L. R., 1 Eq. 457; L. R., 3 Ch. App. Cas. 383; *Parker v. Nixon*, 9 Jurist [N. S.] 451; *Sidgreaves v. Brewer*, 15 Ch. Div. 594; *Smith's Estate*, 2 Pa. Co. Ct. Rep. 626; *Nelson v. McGiffert*, 3 Barb. 164; Shouler on Wills, § 407; *Ludlum v. Otis*, 15 Hun, 413; *In re Fisher*, 4 Wis. 254; *Price v. Maxwell*, 28 Penn. St. 23; *Henfrey v. Henfrey*, 6 Jurist, 355; *Plenty v. West*, 15 Eng. Law and Eq. 283; 17 Jurist, 9; Jarman on Wills, 173.) The residuary clause of the codicil takes all of the estate not named in the codicil and includes all that is not excepted from it. (*Cholmode'y v. Weatherby*, 11 East, 322; *In re Hastings*, 20 Wk'ly Rep. 616; *Wallack v. Seymour*, Id. 634; *Holder v. Howell*, 8 Vesey, 100; *Thayer v. Wellington*, 9 Allen, 297; 1 Jarman on Wills, 760; *In re Fisher*, 4 Wis. 254.) That some of the legacies in the revoked will are specific and the residuary clause of the codicil general does not alter the revocation. (*Arrowsmith's Trust*, 2 D. F. & J. 474; *Barklay v. Maskeylne*, 5 Jur. [N. S.] 12; *Butler v. Greenwood*, 22 Beav. 303; *Hill v. Walker*, 4 Kay & J. 168.) The legacies in the codicil are not cumulative, but substitutions for those of the will. (*St. Albans v. Beauclerk*, 2 Atk. 636; *Coots v. Boyd*, 2 Brown's Ch. 521; *Osburn v. Leeds*, 5 Vesey, 384; *Moggridge v. Thackwell*, 3 Brown's Ch. 517; *Barclay v. Wainwright*, 3 Vesey, 462; *Atty.-Gen. v. Harley*, 4 Madd. 266.) It was the intention of the testatrix, as gathered from the two instruments and from all the circumstances, to revoke the will and make an entirely new disposition of her estate by the codicil. (*In re Fithian*, 44 Hun, 457, 181; *Scott v. Meeker*, 2 id. 162.)

Roy C. Webster for respondents. It is a general rule of the courts of law and equity to sustain a written instrument in all its provisions, so far as possible, and to reject no clause or sacrifice an interest when it can be reconciled. (*Taggart v. Murray*, 53 N. Y. 233; *Wood v. Sheehan*, 68 id.

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365; Redfield on Construction of Wills [4th ed.] 352, 353.) For the purpose of ascertaining the testator's intention, the whole instrument must be considered. (*Westcott v. Cady*, 5 Johns. Ch. 334; *Hamilton v. Taylor*, 18 N. Y. 358; *Lynch v. Pendegast*, 67 Barb. 501; *Howland v. U. T. Sem.*, 5 N. Y. 214; *Brown v. Clark*, 16 Hun, 559; 77 N. Y. 369; *McMaster Estate*, 1 McCarty, 459; Redf. Sur. Pr. [2d ed.] 191, 192; *Brant v. Wilson*, 8 Cow. 56; *Conover v. Hoffman*, 15 Abb. Pr. 100; Jarman on Wills [5th Am. ed.] 346; 5 Ves. 243; 6 id. 100; *Whitmore v. Parker*, 52 N. Y. 462; *Oxley v. Lane*, 35 id. 340; *Harrison v. Harrison*, 36 id. 548; *Post v. Hover*, 30 Barb. 313; *Gilman v. Redington*, 24 N. Y. 9.) The introductory terms of a will or codicil may be considered to aid in its construction. (*Clark v. Jacobs*, 56 How. Pr. 519; *Youngs v. Youngs*, 45 N. Y. 257.) Specific legacies in a will are not revoked by general gift in a codicil. (1 Jarman on Wills [5th Am. ed.] 343, 346; 2 D. F. & J. 474; Redfield on Construction of Wills [4th ed.] 352; *Webb v. Carpenter* [R. I.] 12 Am. R. 129; *McNaughton v. McNaughton*, 34 N. Y. 201; *Philson v. Moore*, 23 Hun, 155; *Beck v. McGillis*, 9 Barb. 35.) Where two bequests, although of equal amounts, are given to the same legatee in different instruments, as by will in one case and a codicil in another, the presumption is in favor of the legatee, and he takes both. (*De Witt v. Yates*, 10 Johns. 156; 4 Hun, 739, 747; Wash. on Real Prop. [4th ed.] 530; *Ex parte Fuller*, 2 Story [U. S. Rep.] 327; *Ives v. Allen*, 13 Vt. 629; *McKinstry v. Sanders*, 2 T. & C. 181; 43 N. Y. 368.)

Satterlee & Yeoman for commissioners of Mount Hope Cemetery, respondents. If the legacies to these respondents were for the same purpose and cumulative, they are valid because given by different instruments. (*De Witt v. Yates*, 10 Johns. 157; *Chapin v. Montgomery*, 4 Hun, 739-747.)

DANFORTH, J. Both will and codicil were admitted to probate by the surrogate of Monroe county, and administration granted to the persons named in the will as executors; and some difference having arisen as to the effect of the codicil,

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this action was brought by executor Newcomb and others against executor Webster and others for the purpose of obtaining a judicial construction of its provisions. The plaintiffs contend that the codicil revokes all the provisions of the will, except those relating to the appointment of executors, while the defendants suppose that both instruments can stand and the legacies and devises in each take effect.

The court at Special and General Terms have substantially sustained the view of the defendants, and from that decision the plaintiffs appeal.

It may be taken as a well settled general rule that a will and codicil are to be construed together as parts of one and the same instrument, and that a codicil is no revocation of a will further than it is so expressed. (*Westcott v. Cady*, 5 Johns. Ch. 343.) But if regarded as one instrument, it is found to contain repugnant bequests in separate clauses, one or the other, or both, must fail, and, therefore, the rule is, that of the two the bequest contained in the later clause shall stand.

The same principle applies with greater force where there are two distinct instruments relating to the same subject-matter. In such a case an inconsistent devise or bequest in the second or last instrument is a complete revocation of the former. But if part is inconsistent and part is consistent, the first will is deemed to be revoked only to the extent of the discordant dispositions, and so far as may be necessary to give effect to the one last made. (*Nelson v McGiffert*, 3 Barb. Ch. 158.)

In the case under consideration it appears that the testatrix in her lifetime, and after the making of the will, so dealt with the principal real estate described in it as by sale to revoke the gifts mentioned in the second and fourth clauses. She also acquired real estate, and entertained a desire that beneficiaries other than those first selected should share in her bounty. These circumstances would naturally require a redistribution of her estate, and in view of them, we think it clear that the testatrix intended to make new disposition of her entire property. Such is, at any, rate the effect of the language employed by her. There is, moreover, an express

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revocation of so much of the will as is inconsistent with the provisions of the codicil. If we apply this language literally, it is obvious that the entire will is to be discarded, except so much as appoints executors and defines their powers. The codicil does not deal with that subject, and to that extent the testatrix was justified in regarding the will as a subsisting instrument. The codicil does, however, make a complete disposition of the property of the decedent, either by special legacy or residuary clause; it is capable of operation without aid from the will and, in fact, is entirely independent of it. The property divided, according to its terms, would leave nothing to apply upon the legacies or bequests of the will. The codicil, moreover, introduces new beneficiaries, and while it provides also for persons already named in the will, does so, not by referring to the will, or by way of increase or addition to shares given by it, but evidently by substitution, and then by formal and explicit language the testatrix gives to her four nieces all the rest and remainder of her estate, both real and personal, to be divided equally among them. The remainder here spoken of is that which is left after satisfying the legacies provided for in the same instrument, and it is impossible for the disposition made by the will to stand with that made by the codicil. Both instruments were, however, properly admitted to probate for the appointment of executors by the will, holds good although the estate is to be administered according to the provisions of the codicil.

The plaintiffs are, we think, entitled to a decree to that effect, and so far as the judgment appealed from is to the contrary, it should be reversed, with costs to the appellant. But as the defendants have heretofore succeeded, they also should have one bill of costs, both to be paid out of the estate.

All concur.

Judgment accordingly.

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113	198
124	530
113	198
127	408

WILLIAM E. THORN, Appellant, v. HARRIET H. GARNER et al.,
Impleaded, etc., Respondents.

G. died, leaving an estate of over \$4,000,000. By his will he bequeathed to his son T. \$1,000,000 to be paid within eighteen months after the testator's death. There was no provision for the payment of interest on this sum, or for the support of the legatee until it was paid. T. was at the time about twenty-seven years of age, in delicate health, and had always been supported by his father; he was not, however, absolutely incompetent to transact any business, and was named as one of the executors. His fees as executor, had he qualified, would have been largely in excess of any sum he had annually drawn from his father while living. *Held*, that T. was not entitled to any interest on the legacy previous to the expiration of the time fixed for its payment.

The business carried on by the testator had been conducted under the name of G. & Co. The business was continued under the same name by W., brother of the legatee, and the acting executor. During the eighteen months between the death of the testator and the payment of the legacy, certain sums of money were paid to T., amounting to \$164,000, nominally by G. & Co., but which were, in fact, payments on account of the legacy. At the end of the eighteen months the balance of the legacy was credited to T. as payment in full. *Held*, that no interest was properly chargeable on such advances.

Reported below, 42 Hun, 507.

(Argued March 7, 1889; decided April 16, 1889.)

CROSS-APPEALS from different portions of judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 18, 1886, which affirmed a judgment entered upon the report of a referee.

This action was brought by William E. Thorn, the sole surviving executor of and trustee under the will of Thomas Garner, Jr., deceased, to obtain permission from the court for his resignation as executor and trustee, to have a new trustee appointed and for a settlement of plaintiff's account. The defendants, appellants, were the widow and daughter of plaintiff's testator and the beneficiaries under his will. The questions presented arose upon the accounting.

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Plaintiff charged himself with the amount of a legacy given his testator under and by the will of his father, Thomas Garner, Sr.....	\$1,000,000
Less U. S. legacy tax.....	10,000
	<hr/>
	\$990,000
	<hr/>

He credited himself: "By cash paid Garner & Co. for moneys advanced to Thomas Garner, Jr., during his life and before the legacy left him by his father's will was paid, \$177,754.09."

The defendants, appellants, claimed that the moneys alleged to have been advanced by Garner & Co., which were \$164,000, the balance of the credit, being interest, were, in fact, payments upon the legacy; that the legatee was entitled to interest on said legacy from the time of the death of the testator until payment thereof, eighteen months thereafter, and that such moneys should be applied in payment of interest and only the balance credited; also, that no interest was chargeable on the sums so paid.

The further material facts are stated in the opinion.

Homer A. Nelson for plaintiff. Thomas Garner was not entitled to interest on the legacy of \$1,000,000 from the death of his father until it was paid. (*Bradner v. Faulkner*, 12 N. Y. 472; 2 R. S. 90, § 43; 6 Ves. 539, 540, 548; *Id.* 415; 6 Paige, 304, 305; *Green v. Belcher*, 1 Atk. 505; *Heath v. Perry*, 3 *id.* 101; *Hearle v. Greenbank*, *Id.* 695, 716; *King v. Talbot*, 40 N. Y. 76; *Brown v. Knapp*, 79 *id.* 136; Redf. Sur. Ct. 601.) The rule that legacies to a child draw interest from death of testator only applies to infant children. (*Cooke v. Meeker*, 36 N. Y. 18; *Ackerly v. Vernon*, 1 P. Wms. 783; *Hill v. Hill*, 3 Ves. & B. 183; *Miles v. Roberts*, 1 Russ. & M. 555; *Leslie v. Leslie*, Lloyd & Gould, temp. Sugd. 4; *Rogers v. Soutter*, 2 Keen, 598; *Wilson v. Maddison*, 2 Y. & C. 372; *Russell v. Dickson*, 2 Dru. & W. 1133; *Harvey v. Harvey*, 2 P. Wms. 21; *Incedone v. Northcote*, 3 Atk. 438; *Chambers v. Goodwin*, 11 Ves. 2; *Brown v. Temperley*, 3 Russ. 263;

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Hinnion's Exrs. v. Jacobus, 27 N. J. Eq. 29; *Howard v. Francis*, 3 id. 445; *Miller v. Sanford*, 31 id. 427; *Raven v. Waite*, 1 Swanst. 557; *Wall v. Wall*, 15 Simon, 520; *Loundes v. Loundes*, 15 Ves. 301; *Brinckerhoff v. Merselis*, 24 N. J. Law, 680.) Where a settlement appears to have been final and all parties interested to have been before the surrogate, the presumption must be that the settlement embraced everything which was the proper subject of inquiry. (*Bk. of Poughkeepsie v. Hasbrouck*, 2 Seld. 216; *Brown v. Brown*, 53 Barb. 217; *Stiles v. Burch*, 5 Paige, 132; *Wright v. Trustees, etc.*, 1 Hoff Ch. 202; 3 Lans. 324; *Rose v. Lewis*, Gen. Term, 4th Dept. Nov. 1870.)

Joseph H. Choate, Duncan Smith, J. Evarts Tracy and William V. Rowe for defendants. The legacy given by the will of Thomas Garner, Sr., to his son Thomas Garner, Jr., bore interest from the testator's death. The situation of the son, the father's treatment of him, and the fact that he provided no other maintenance for him, by the will, show that this must have been testator's intention. (*Green v. Belchier*, 1 Atk. 505; *Heath v. Perry*, 3 id. 101; *Van Bramer v. Exrs. of Hoffman*, 2 Johns. Cas. 200; *Lupton v. Lupton*, 2 Johns. Ch. 614, 627, 628; *King v. Talbot*, 40 N. Y. 76, 91, 92; *Brown v. Knapp*, 79 id. 136; *Keating v. Bruns*, 3 Dem. 233; *Davison v. Rake*, 16 Atl. Rep. [N. J., Dec. 1888] 227; *Loundes v. Loundes*, 15 Vesey, 301; *Sullivan v. Winthrop*, 1 Sumn. 1, 15; *Hearle v. Greenbank*, 3 Atk. 716; *In re Rouse's Estate*, 9 Hare, 649, 653; *In re George*, 5 Ch. D. 837; 47 L. J. Ch. 118; *Hennion v. Jacobus*, 27 N. J. Eq. 28-30. *Heath v. Perry*, 3 Atk. 101, 102; *Bowman's Appeal*, 34 Pa. St. 23; *Leech's Appeal*, 44 id. 140, 142; *Cox v. Corkendalls*, 13 N. J. Eq. 136, 140; *Brinckerhoff v. Merselis*, 24 N. J. Law, 680; *Morgan v. Pope*, 7 Coldw. 541, 549, 550; *Hart v. Williams*, 77 N. C. 426, 428; *Chisholm v. Chisholm*, 4 Rich. [S. C.] Eq. 266, 270; *McWilliams v. Falcon*, 6 Jones Eq. 235, 236, 237; *In re Wood*, 1 Dem. 559, 567; *Howard v. Francis*, 30 N. J. Eq. 444, 448; *Raven*

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v. *Waite*, 1 Swanst. 553; *Wall v. Wall*, 15 Sim. 513, 520; *Perry v. Whitehead*, 6 Ves. 546; *Russell v. Dickson*, 1 Con. & Law, 284, 290; 2 Dr. & War. 133, 141; 4 Ir. Eq. Rep. 339, 343.) Interest should at least have been collected on the \$1,000,000 legacy, from the expiration of one year from the death of Thomas Garner, Sr., and accounted for by the plaintiff, with interest thereon. (2 R. S. 90, § 43; *Lawrence v. Embree*, 3 Bradf. 364, 366; *Campbell v. Cowdrey*, 31 How. Pr. 172; *Dustan v. Carter*, 3 Dem. 149; *Matter of Noyes*, 5 id. 309, 318, 319; *Davison v. Rake*, 16 Atl. Rep. 227; *Wheeler v. Ruthven*, 74 N. Y. 428, 431; *Marsh v. Hague*, 1 Edw. Ch. 174, 187; *In re Spencer*, 12 Atl. Rep. 124, 128.) The fact stated that the debts due the estate are not collected will not justify the decree that they were not collectible. That they were not must be shown by a proper statement. (*In re Jones*, 1 Redf. 263, 267; *Watts v. Jenkins*, 11 Barb. 546; *Bk. of Poughkeepsie v. Hasbrouck*, 6 N. Y. 216; *Brown v. Brown*, 53 Barb. 217; *Arnett v. Kerr*, 2 Rob. 556, 569; *Buck Estate*, 15 Abb. Pr. 12, 41; *Johnson v. Richards*, 3 Hun, 454.)

Nathaniel S. Smith, guardian *ad litem*, for infant defendants. Interest should not have been allowed on the legacy to Thomas Garner from the death of the testator to its payment. (*Bradner v. Faulkner*, 12 N. Y. 474; *Green v. Belcher*, 1 Atkyn, 105; *Heath v. Perry*, 3 id. 101; *Hearle v. Greenbank*, Id. 695; *King v. Talbot*, 40 N. Y. 77; *Brown v. Knapp*, 79 id. 141; *Raven v. Waite*, 1 Swanst. 557; *Lowndes v. Lowndes*, 15 Ves. 301.)

PECKHAM, J. On the 16th of October, 1867, Thomas Garner, a resident of the city of New York, died. Up to the time of his death he had carried on an extensive business in the manufacture and sale of cotton goods under the firm name of Garner & Co. By his will he gave and bequeathed to his son Thomas, plaintiff's testator, the sum of \$1,000,000, to be paid to him within eighteen months after the testator's decease. The chief ques-

tion arising upon this appeal is, whether the legacy bore interest from the time of the death of the testator up to the time when it was paid, eighteen months thereafter. It has thus far been held that it did. We have come to a contrary conclusion. The statute prohibits the payment of legacies until a year after the granting of letters testamentary; and the general principle is that interest upon legacies is not payable until the principal becomes due. If interest be allowed before that time, without a specific direction in the will, it constitutes an exception to the rule, and is founded generally upon certain facts which the courts have agreed are equivalent to an express direction in the will to pay interest, because, from such facts, the courts will presume an intention on the part of the testator to have it paid. (*Bradner v. Faulkner*, 12 N. Y. 472; *Cooke v. Meeker*, 36 id. 18; *Brown v. Knapp*, 79 id. 136.) The fact that the legacy was payable to an infant child, or to an infant towards whom the testator had stood in *loco parentis*, such as a grandchild, and that there was no other provision made in the will for the maintenance of such legatee, has been regarded by the courts as a fact sufficiently indicative of the intention of the testator to authorize payment of interest from his death, although such direction was not found in the will. (Cases cited *supra*.) The widow and daughter of the deceased legatee in this case claimed that there were facts existing which showed that it was the intention of the testator that the legacy should draw interest from the time of his death. It cannot be disputed that if such were his intention, it is the duty of the court to carry it out. As there was no specific direction in his will to pay interest, the claim that, nevertheless, it was the intention of the testator that it should be paid from the time of his death, is founded upon the statement that the legatee, although at the time of the death of the testator a man twenty-seven or twenty-eight years old, was yet in poor health, unable to support himself, and that from his birth up to the time of the death of the testator he had been wholly supported by such testator, and that the legacy was, of course, given to him for his support and maintenance, and on

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account of these facts it was intended by the testator to bear interest from the time of his death; that it could not have been his intention that his son, the legatee, should have no fund to resort to for his support for eighteen months after his death. The learned counsel for the widow and child of the legatee admitted, and very properly, that the mere fact that a legacy is given for the support, in express terms, of an adult child, is not sufficient to rebut the presumption which exists against an adult that he is able to support himself for the first year, and that, therefore, the support referred to in the particular case must be what is ordinarily understood as support after the first year in accordance with the usual practice. But he claims that the rule is altered when the additional fact is found that on account of the ill health of the legatee, in this case, he was unable to support himself during that year, and that he had no other means of support than the legacy given him by the will of his father. We have looked at all the cases cited by the counsel upon this question, and we find none where it is held that interest upon a legacy is payable from the death of the testator where the legacy was given to an adult. In *Mc Williams v. Falcon* (6 Jones' [N. C.] Eq. 235), the interest was directed to be paid annually for the sole and separate use of the testator's mother, and the legacy was demonstrative and the fund productive. In *Hart v. Williams* (77 N. C. 426), the legatee was a freedman. The legacy was a pecuniary one, and, so far as I can understand from the case, interest was allowed commencing a year from the death of the testator. In *Morgan v. Pope* (7 Coldw. [Tenn.] 541), interest, in fact, was allowed commencing a year from the testator's death. We think there is not enough in this case to show that the intention of the testator (which, as all agree, is the controlling element) was that interest, from the time of his death, should be paid upon this legacy. The legatee, although in delicate health, was not, as the case shows, absolutely incompetent to transact any business.

He was a gentleman of leisure; traveled considerably; bought land and built or repaired a house, and clearly was

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able to be out and to give some little attention to business for at least a portion of the time, had he so desired. It is true his father had always supported him; but it is equally true that his father knew the condition of his son's health, his capacity for business and his general ability to transact it, and, with such knowledge, made him one of the executors of his estate. The testator was a man of experience, engaged in large business enterprises and a man who had made an immense fortune, stated in the case to have been at the time of his death, between four and five millions of dollars. From the time his son became of age he had given him a salary, nominal in amount, and allowed him to draw for sums far in excess of the amount of his salary. These were charged upon the books of the testator as against the salary account, and the balance charged to profit and loss. To such a man the question of interest was, necessarily, an important one. It was, of course, present to his mind, and it cannot be supposed that if he had intended interest should be paid from the time of his decease, his will would have been silent upon that subject. The language of GARDINER, Ch. J., in *Bradner v. Faulkner* (*supra*), upon the same subject, is very apt here. "In addition to these considerations we have the strong negative evidence of the intention of the testator in his omission to provide that this legacy should draw interest from any period. He was aware that there was to be an interval between his death and the receipt of this bequest by the beneficiary, should his executors comply literally with his injunctions. The amount (of the legacy) was large, and the interest, even for a few months, too considerable to escape the attention of a man in the habit of making investments and realizing interest upon them, as the inventory of his estate proves to have been the case with the testator. That he, as a man of business, should make no provision for interest, under these circumstances, is presumptive evidence that, in his own opinion, the advantages of his daughter in the disposition of his property, could be, and were equalized without it." * * *

"It is enough that the matter (of the payment of interest) is

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“left in doubt. Plaintiff can rely on the general rule that “no interest accrues until the legacy was payable. The burden is upon those who claim it, to show a clear intent that “interest should be paid from the time of the death of the testator, notwithstanding his silence on the subject. This has “not been done. We are not authorized to speculate as to “his intention, or to add to the will by mere conjecture.” Before the death of his father, so far as appears from the evidence, the legatee had never drawn as much as \$15,000 a year; but by his appointment as one of the executors of this estate he had but to qualify, or, in other words, to do what his father by such appointment desired that he should do, and his fees as executor would have been largely in excess of any sum he had annually drawn from his father while living. It may very well be that the testator appointed him executor for the very purpose of enabling him to earn such fees and to place him, in some degree, upon an equality (in the management of the estate, at least) with his younger brother William T.; and, in addition, the fact that he was executor would enable him to pay himself the amount of the legacy bequeathed to him at the earliest possible moment consistent with the proper administration of the estate. If it were admitted that the rule has been correctly stated by the counsel for the widow of the legatee, we yet hold that this case does not fall within the most liberal construction of that rule, because it is evident from the facts that the legatee had but to qualify as executor of the will of his deceased father to put himself in a position to earn, with very slight effort, far more in the course of a year than he had ever received from his father while living in the same length of time, and also because by virtue of his position as executor he could have paid the legacy to himself, as above stated. These facts, together with the absence of any direction in the will to pay interest, seem to us to be conclusive against any such intention having existed in the mind of the testator when he executed the will.

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What has already been said disposes of the claim made by the counsel for the widow of the legatee, that in any event interest upon the legacy is payable at the expiration of the year from the death of the testator. By the terms of the will it was not due until eighteen months from the time of the testator's death, and the cases cited by the learned counsel, in relation to interest being payable at the expiration of the year, do not apply. The interest charged against plaintiff upon the legacy for eighteen months, and the interest on that sum, must, therefore, be stricken from the account.

The next question arising is whether the interest amounting to \$13,198.95 upon certain alleged advances of Garner & Co. to the legatee is properly charged? We think plainly not. By the system of bookkeeping adopted, it appeared that during the eighteen months which elapsed between the death of Thomas Garner, Sr., and the payment of the legacy of \$1,000,000, certain sums of money, amounting to one hundred and sixty-four thousand and some odd dollars, were paid to the legatee by Garner & Co., and interest upon those payments was charged from the time of each payment until the repayment by the plaintiff after the receipt of the million dollar's legacy. In truth, there were no such advances and no such interest. The whole thing was a mere matter of bookkeeping. Garner & Co. consisted simply of William T. Garner, the brother of the deceased legatee and the executor of his father's will, and the payments made to the legatee, nominally by Garner & Co., were payments on account of the legacy to such legatee by William T. Garner, the executor, and during that eighteen months they amounted to the sum above mentioned. At the expiration of the eighteen months the balance of the million dollars became due and was credited on the books to the legatee as a payment in full of that amount, deducting therefrom the internal revenue tax. The payments actually made being made in truth by William T. Garner on account of the legacy, no interest on those alleged advances by Garner & Co., which was simply another name for William

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T. Garner, could properly be charged; and that sum should be deducted from such alleged payments.*

* * * * *

The decree of the court below should be modified in conformity with the views expressed here, and as modified affirmed, with costs to all the parties payable out of the fund.

All concur.

Judgment accordingly.

ALEXANDER VAN RENSSELAER, as Executor, etc., Respondent,
v. ANNIE W. VAN RENSSELAER et al., Appellants.

The will of P., executed in 1871, after various legacies which he directed to be paid out of a certain fund, gave a legacy of \$10,000 to the testator's sister E., the directions for the payment of which were as follows: "To be paid by my executors when it shall be convenient for them, without regard to the time fixed by law, out of the moneys derived from the sale of the Van Schaick farm, * * * or otherwise, as it shall seem best to them. It is further my will that this legacy shall be deemed subservient to all others." Following this was a gift of the residuary estate. The testator had, previous to the execution of the will, entered into a contract with agents for the sale of the farm mentioned, in city lots. He died in March, 1878. Previous to June, 1874, there had been paid over to the sole acting executor, or upon his order to the residuary legatee, over \$15,000 of proceeds "derived from the sale" of said lots, and said legatee received more than sufficient to pay the legacy to E. In an action against said executor and legatee for an accounting and to compel payment to E. of said legacy, *held*, that by the will the legacy was charged upon the land specified and the proceeds of the sale, which not only stood as security, but were to be deemed the primary fund from which such payment should be made; that when the residuary legatee took the land and its proceeds she took it *cum onere*, and having accepted the devise must discharge the obligation resting upon it; that the provision making the legacy "subservient to all others" did not include the residuary gift, but simply the general legacies; and that the "convenience" referred to respected the situation of the estate, not the choice or arbitrary will of the executor, and when all the other general legacies were paid, leaving a surplus of the general fund intact for the residuary legatee, and there remained sufficient from the farm sales to pay the legacy to E., it became due and

* The omitted portion of the opinion treats of small items in the account and presents nothing of general interest.

113	207
124	530
113	207
126	277
127	406
113	207
129	280
113	207
138	459
113	207
140	255

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payable, and both the executor, who had misappropriated the money and the residuary legatee who had wrongfully accepted it, became liable for its payment, although there remained unsold of the farm lands sufficient to pay the legacy.

Also, *held*, that plaintiff was entitled to interest from the time when sufficient of the proceeds of the farm sales had been realized to pay her legacy.

Where a complaint presents a proper case for equitable jurisdiction the fact that the possible result of the action may be a personal judgment does not oust the court of jurisdiction, or entitle the defendant to a jury trial.

The executor had had a final settlement of his accounts. Upon that settlement, against the objection of E., the executor was allowed to exclude from his account the proceeds of the farm sales, and the account was settled without regard thereto. *Held*, that the decree of the surrogate upon such settlement was no bar to this action. (Code Civ. Pro. § 2742.)

(Argued March 11, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 26, 1887, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

The nature of the action and the material facts are stated in the opinion.

Thomas Allison for appellants. The decree of the surrogate, upon the accounting by the defendant Hamilton as executor, was conclusive in favor of both of the defendants, Hamilton and Van Rensselaer, against the right of the plaintiff to recover the judgment rendered and appealed from herein. (Code, §§ 2472, 2743, subds. 3, 4; *Stiles v. Burch*, 5 Paige, 132; *Purdy v. Hayt*, 92 N. Y. 446; *In re Verplanck*, 91 id. 439; *Riggs v. Cragg*, 89 id. 479; *Matter of Hood*, 90 id. 512; *Leavitt v. Wolcott*, 95 id. 212; *Crabb v. Young*, 92 id. 56; *Brown v. Mayor, etc.*, 66 id. 391; *Demarest v. Darg*, 32 id. 281.) The legacy being a demonstrative one, it was not payable out of and could not be recovered from the general assets of the testator until the fund out of which it was primarily payable had been exhausted. (*Giddings v. Seward*, 16 N. Y. 365;

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Pierrepoint v. Edwards, 25 id. 131; *Florence v. Sands*, 4 Redf. 206; *Enders v. Enders*, 2 Barb. 367; 2 Williams on Executors [4th Am. ed.] 994; 2 Redfield on Wills [3d. ed.] 127; *Selden v. Watts*, 9 Week. Rep. 847.) The judgment appealed from cannot be sustained upon the theory that the legacy is a charge upon the land. (*Warren v. Davies*, 2 M. K. Ch. 49.) There could, in no event, be a judgment for this legacy against both the executor, as such, and Mrs. Van Rensselaer, who was not executrix, and was neither sued nor held liable as executrix, but who was, and was sued and held liable as residuary legatee and devisee. (Code, § 1821.) The court below erred in allowing interest on the legacy from one year from the granting of letters testamentary. (2 Roper on Legacies, 1245, 1246; *Wheeler v. Ruthven*, 74 N. Y. 428.) The defendants, appellants, had a right to have the issues tried before a jury, and could not be deprived of that right by plaintiff pleading in her complaint a cause of action in equity. (*Beck v. Allison*, 56 N. Y. 366, 372, 373; *Wheelock v. Lee*, 74 id. 495.)

J. Edward Ackley for respondent. The action was properly tried at Special Term, being such a one as would be called equitable, under the former practice, and the request for a trial by jury was properly overruled. (Code Civ. Pro. § 1819; *Rundle v. Allison*, 34 N. Y. 180; *Kelsey v. Western*, 2 id. 500; 508; *Loder v. Hatfield*, 71 id. 92; 3 Williams on Executors, 2117, note b; 1 Story on Eq. Jur. § 593; 2 Roper on Legacies [White's ed.] 685; Jeremy's Eq. Jur. 104; *Murtha v. Curley*, 90 N. Y. 372; *Hale v. Omaha Nat. Bk.*, 49 id. 631; *Marquat v. Marquat*, 12 id. 336; *Barlow v. Scott*, 24 id. 40; *Emory v. Pease*, 20 id. 62; *Conaughty v. Nichols*, 42 id. 83; *Bell v. Merrifield*, 109 id. 202.) An account of the receipts for the sale of land having been rendered, it became unnecessary to give that relief, and a simple money judgment was ordered, but the nature of the case was not thereby altered in any particular, or changed into a legal action. (*Bell v. Merrifield*,

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109 N. Y. 207; *Murtha v. Curley*, 90 id. 372; *Hale v. Omaha Nat. Bk.*, 49 id. 631.) The appellants waived any right to a trial by jury by noticing the case for trial at Special Term. (*McKellar v. Rogers*, 109 N. Y. 471.) As the defendant Van Rensselaer accepted the devise of the farm, shown by her conveying part of it, she became liable to pay the amount of the plaintiff's legacy. (*Loder v. Hatfield*, 71 N. Y. 104; *Glen v. Fisher*, 6 Johns. Ch. 33; *Maxwell v. Wetenhall*, 2 P. Wms. 26.) The questions raised upon the accounting before the surrogate and those raised in this action are entirely different. (Redfield on Surrogates, 571; 2 R. S., chap. 6, tit. 3, art. 2, § 46; 2 Code Civ. Pro. § 723.) But even if the questions before the surrogate had been the same as those involved in the present action, the surrogate had no jurisdiction to try and determine them. (*Bevan v. Cooper*, 72 N. Y. 328; Code Civ. Pro. §§ 2718, 2742, 2749.)

FINCH, J. This action was brought to enforce the collection of a legacy, and resulted in a judgment for its recovery, with the interest accrued, against the sole acting executor and against the residuary legatee. The terms of the bequest were somewhat unusual. The testator, Philip Livingston Van Rensselaer, first gave to his two brothers, and to his sister Alice, \$10,000 each, to be paid out of moneys which he had loaned from time to time to a relative whom he named. He then gave to his sister Elizabeth the legacy now in question, using the following language: "I hereby give and bequeath to my sister Elizabeth the sum of ten thousand dollars, to be paid by my executors when it shall be convenient for them, without regard to the time fixed by law, out of the moneys derived from the sale of the Van Schaick farm left me by my brother Courtlandt, or otherwise if it shall seem best to them. It is further my will that this legacy shall be deemed subservient to all others." The testator then gave a small legacy to the College of New Jersey, and all the rest, residue and remainder of his property to his wife Annie. He named her as executrix, and the defendant Hamilton as executor, but the latter only qualified and acted.

The will is dated May 26, 1871, and the testator died in March, 1873. It is now sixteen years since the will took effect, and the legacy given to Elizabeth remains still unpaid. She has died, and her representatives are seeking in this action to enforce the gift so long and persistently withheld. In 1870, and about one year before the date of the will, the testator had entered into a contract with John P. Albertson and Levi Smith for the sale by them in city lots of the Van Schaick farm, which was situated near the city of Troy. They were described as his agents and as acting in his employ. They were to find purchasers and the deeds to be executed by Van Rensselaer; the proceeds of all sales were to be received by them, applied first to the payment of necessary disbursements, and then the balance to be paid to Van Rensselaer until he had received the full sum of \$20,000, at which time the unsold land was to belong in equal proportions to the two parties to the contract, and the proceeds of further sales to be equally divided. Under this contract the testator, before the date of his will, had received in mortgages, as the product of sales, a little over \$2,000, and was expecting more to follow; and before his death had received in such mortgages a total of \$8,140. These were proceeds "derived from the sale of the Van Schaick farm," and were turned into money after his death by a transfer of them to Albertson and Smith, who discounted them at a moderate reduction, and they became in the hands of the executor "moneys derived from the sale of the Van Schaick farm," and within the precise description of the will. The reduction in the amount of these mortgages by the process of turning them into money was probably not far from \$1,000, so that something over \$6,000 or \$7,000 was realized in cash. This sum was paid to the residuary legatee, and the executor declares that none of it came into his hands; but he admits that he executed the assignments to enable the legatee to get the money, and it is plain that the purchasers from the executor would have paid him if he had not authorized a direct payment to the legatee.

It is found as a fact that, after testator's death, proceeds of

the farm passed through the executor's hands to the amount of \$17,240. The appellants insist that in this sum is included the amount realized from the mortgages sold. I do not see how that can be true. Smith furnishes an abstract of all payments made to the estate which, of course, includes the mortgages afterwards discounted, and the total is \$23,584. If we deduct from that the proceeds of those mortgages, which the court finds to have been \$6,344, treated as received by the testator in his lifetime, there remains exactly the \$17,240 fixed by the finding. Smith swears that, in round numbers, about \$24,000 was realized from the sales, and that more than \$20,000 had been paid on account of the contract to the testator and the estate. I do not deem it material to further examine that subject, for the proceeds of the testator's mortgages were never included by the executor in the general assets, or accounted for as such, but were moneys derived from the farm sales and specifically applicable to the legacy due Elizabeth. The executor misappropriated them when he permitted their payment to the residuary legatee.

The widow has been paid and has received into her possession more than enough of the proceeds of the farm to pay the legacy to Elizabeth. That legacy, by the terms of the will, was charged upon the specific land and the proceeds of its sale. The legacy was to be paid out of it, and it was not only to stand as security for the payment, but to be deemed the primary fund from which such payment should be made. When the residuary legatee took the land and its proceeds she took them *cum onere*, subject to the charge imposed upon them, and having accepted the devise must discharge the obligation resting upon it.

The principal defense argued in her behalf is founded upon the peculiar terms of the legacy. Proof was given that enough of the unsold land remained to provide for the legacy at some time in the future when sales shall again become possible at what are deemed suitable prices by the parties having them in charge, and so it is claimed that the legacy of Elizabeth could be postponed because it was payable at the con-

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venience of the executor, and because it was made subservient to all the other legacies. By the words "all others" is meant all other legacies of the same class and kind; that is, all the general legacies given by the will. The language is "*this* legacy shall be subservient to all others." The explanation of the provision seems to me quite obvious. Outside of the Van Schaick farm the bulk of the testator's property was a debt due to him from a relative, and sufficient in amount to pay the legacies which had a preference in the mind of the testator, and beyond that to furnish a surplus, adequate, if not further diminished, for the support of the widow. That fund he desired to preserve for those purposes. Elizabeth had married a wealthy husband, and if any legacy should fail or abate, or be sensibly diminished, he preferred it should be that, and such was his meaning in charging it upon the Van Schaick farm and making it payable out of the existing contract for its sale and declaring it as a legacy subservient to all others. But nothing in the will provides or indicates that when all other legacies were paid, and the surplus of the general estate was preserved intact for the widow, and there yet remained sufficient from the farm sales to pay Elizabeth, that she should be further postponed. He knew that the amount and time of the sales would be uncertain, and, lest for that reason the general estate might be drawn upon to pay Elizabeth, he made her legacy payable at the convenience of the executor. But that convenience respected the situation of the estate, and not the choice or arbitrary will of the executor; and when money enough was realized from the sales to pay Elizabeth from that designated source, there was no excuse for further delay, the legacy became due and payable, and the executor who misappropriated the money, and the legatee who wrongfully accepted and retained it, became alike liable for its payment.

But further difficulties have been suggested. The case was tried at Special Term. At the outset the defendants objected to the tribunal "as an improper one for the trial of any question involving a personal judgment" against either of the defendants, and "demanded that *if such question was to be*

tried it should be by a jury trial." This objection was not that the case as disclosed by the pleadings was only triable by a jury. It looked not to the case as presented by the complaint, but as it might possibly be decided at the end. Such an objection is wholly unsound. It conceded that the action as it came into court was of an equitable character, as it certainly was, but insisted that if the final relief was to be a personal judgment, the case was one for a jury. A court of equity does not in that manner lose its jurisdiction, and, having once acquired it, retains it to the end, even though it may turn out that adequate relief is reached by a merely personal judgment. That is not an uncommon occurrence. But a more serious objection taken in behalf of the executor was founded upon the settlement of his accounts, as such, and the final decree of the surrogate, which is claimed to be conclusive upon the issues raised in this action. Upon that settlement the executor wholly excluded from his account the proceeds of the farm sales, and was neither charged with them on the one hand nor credited with them on the other. By his own act, the surrogate assenting, they were withdrawn from that litigation and left outside of the settlement made. To this the legatee Elizabeth objected, but in vain, and the account was settled irrespective of any of the proceeds of the Van Schaick farm. That decree has no effect upon what was not involved in the settlement, because explicitly withheld from it and put outside of its operation. The Code of Civil Procedure (§ 2742) provides upon what facts the judicial settlement of an executor's account shall be conclusive and expressly excludes all others. The facts settled are: (1.) That the items of expenditure allowed are correct. (2.) That the accounting party has been charged with all interest for money received by him and *embraced in the account*. (3.) That the money charged as collected was all that was collectible *on the debts' stated in the account*. (4.) And that the allowances for increase and decrease, *as made in the value of property*, were correctly made. It will be observed that none of these facts are in any manner questioned or controverted in this action. What concerns us now

was not before the surrogate then or involved in any of the facts as to which the decree is conclusive. By the action of the executor himself the questions here presented, if, indeed, the surrogate could have solved them at all, were withdrawn from his jurisdiction and left for the consideration of another forum.

A further objection is taken to the allowance of interest which was computed in the judgment from one year after the issue of letters testamentary. That is the rule where no time of payment is fixed by the will, and the legacy then becomes due. But the testator set aside the legal rule by the very terms of his bequest, and made the legacy payable out of a specific fund, and when convenient for the executor. We have already said what was meant and intended by that convenience, and that the legacy became payable when sufficient moneys had been realized from the farm sales to pay the bequest. The figures furnished by the agents who made the sales, show that on the 1st of June, 1874, they had exceeded \$16,000, and more than \$15,000 of the purchase-money had been paid in cash to the executor or upon his direction. With funds in hand at that date sufficient to pay the legacy, and no possible inconvenience to the estate preventing that application, the legacy became due and interest began to run upon it. Its allowance, therefore, was not error.

The judgment should be affirmed, with costs.

All concur, GRAY, J., concurring in result.

Judgment affirmed.

Statement of case.

WILLIAM H. JACKSON et al., Respondents, v. JESSE H. BUNNELL et al., Appellants.

After a final judgment in an action which does not award an injunction, staying finally and entirely the enforcement of a judgment in another court, and reserves no right to apply upon the foot of the decree, that relief may not be granted by order on affidavits.

A permanent injunction is in no sense a provisional remedy, and can only be granted where the pleadings in an action show its necessity and the remedy is asked as an element of the final relief sought (Code Civil Pro. § 602); and so, it may not be granted by mere order when no action between the parties is pending, although actions covering the controversy have gone to final judgment.

Travis v. Myers (67 N. Y. 542) distinguished.

(Argued March 5, 1889; decided April 16, 1889.)

APPEAL from order of the General Term of the Court of Common Pleas in and for the city and county of New York, made May 5, 1887, which affirmed an order of Special Term, continuing and making permanent a preliminary injunction granted with an order to show cause upon which the motion was made.

The material facts are stated in the opinion.

Esek Cowen for appellants. There was no authority in the court below to grant a permanent injunction on affidavits and after entry of final judgment. (Code of Civ. Pro. §§ 602, 608; *Snelling v. Howard*, 7 Duer, 400; *Fellows v. Heermans*, 13 Abb. Pr. [N. S.] 1, 9; *Erie R. Co. v. Ramsey*, 45 N. Y. 645; *Spears v. Mathews*, 66 id. 117; *Wayland v. Tyson*, 45 id. 281; *Thompson v. E. R. Co.*, 45 id. 468, 472; *Gardner v. Gardner*, 87 id. 14.) No injunction, even *pendente lite*, to restrain the defendants from enforcing their lien, can be granted, as the plaintiffs have not shown that they were entitled to such relief in the action. (Abbott's Trial Ev. 832; *Ward v. Dewey*, 7 How. 17; *Hulce v. Thompson*, 8 id. 475; *Wordsworth v. Lyon*, 5 id. 463; Story Eq. §§ 897, 898; *Stull v. Westfall*, 25 Hun, 1; Kerr on Inj. [ed. 1871] 613, § 23; *Dawson v. Gates*, 1 Beav. 301; *Burgess v. Horne*, 14 L. T. 461; *McHenry v. Henry*, 90 N. Y. 58; *Olesen v. Smith*, 7 How. 481; High on Injunc.

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§ 1573; *Gentil v. Arnaud*, 38 How. 94; *Hartt v. Harvey*, 19 id. 245; *Olmstead v. Loomis*, 6 Barb. 152; *Crocker v. Baker*, 3 Abb. Pr. 182; *Hovey v. McCrea*, 4 How. 31.) The facts presented by plaintiffs were not sufficient to authorize an injunction, because they do not show that the proposed sale would tend to make the judgment ineffectual. (*McHenry v. Jewett*, 90 N. Y. 58, 62; *Cameron v. White*, 3 Tex. 152; *Henderson v. Morrill*, 12 id. 1; *Power v. Village of Athens*, 19 Hun, 165; *N. Y. & Albany R. R. Co. v. W. S. R. R. Co.*, 11 Abb. N. C. 386; *Bayard v. Fellows*, 28 Barb. 451.) No injunction could be granted, as not only the equities were denied in the opposing affidavit, but the preponderance of evidence was to the effect that the allegation in plaintiffs' affidavits were false. (*Steinberg v. O'Connor*, 42 How. 52; *Finnegan v. Lee*, 18 id. 186; *Blatchford v. N. Y. & N. H. R. R. Co.*, 5 Abb. 276; *Cassell v. Fiske*, 2 Civ. Pro. Rep. 94; *Am. G. Pub. Assn. v. Grocer Pub. Assn.*, 51 How. Pr. 462; *Decker v. Decker*, 52 id. 218.)

N. A. McBride for respondents. The court below had the power to restrain the enforcement of an execution issued upon the judgment of Bunnell & McLaughlin recovered in a District Court. (*Shaw v. Dwight*, 16 Barb. 536; *Foster v. Wilson*, 1 Duer, 624; 11 N. Y. Leg. Obs. 624; *Reynolds v. Parke*, 5 Lans. 149.) After judgment is rendered in one court injunction may issue from a different court restraining the enforcement of the execution. (*Shaw v. Dwight*, 16 Barb. 536; *Chappel v. Potter*, 11 How. Pr. 365; *Reynolds v. Park*, 5 Lans. 149; 2 Story's Eq. Jur. 688; Willard's Eq. 356.) Aside from general equity power, this court did have power and authority sufficient to grant the injunction order, staying the judgment of the District Court and the enforcement of the execution issued thereon, under the provisions of the Code. (Code Civ. Pro. § 604, subd. 1.)

FINCH, J. The plaintiffs in this case brought their action to foreclose a lien upon certain property belonging to one Myers,

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and which consisted of six lots with newly constructed buildings thereon, located on the northerly side of Eighty-second street in the city of New York, and one hundred feet easterly of the north-east corner of that street and Tenth avenue. Their notice of lien was filed on the 13th of November, 1886, and their complaint served on the eighth of the following December. The pleadings in that action are not returned, and we cannot know their contents. The referee's report and the final judgment rendered are before us, and from them and other papers we are enabled to ascertain that the parties defendant were, besides Myers, his general assignee, Roberts, and seven other persons, among whom were Bunnell & McLaughlin, who are the present appellants. The latter were made defendants because of a prior lien or attempted lien made and filed by them. Their notice was filed October 30, 1886, or about two weeks in advance of the plaintiffs, but described the property sought to be charged as six three-story houses on the north side of west Eighty-second street "commencing about 100 feet from the corner of Ninth avenue and Eighty-second street." This description was probably incorrect, and may not have covered the houses in question. But it was accompanied by a diagram upon which the six houses are indicated by the figures "100" placed between the west lot of the group and the corner of Tenth avenue. These figures were at first written in the diagram on the other side of the houses and between them and Ninth avenue, but were at some time erased and put where they now appear. Before the 13th of January, 1887, Bunnell & McLaughlin began an action in the District Court of the city for a foreclosure of their lien, making no person defendant except Myers. This the lien law permitted, since their claim was less than \$250. Meanwhile the present action, which was in the Common Pleas, proceeded to its termination. Bunnell & McLaughlin interposed no answer. Their judgment in the District Court appears to have been entered on the 3d day of December, 1886, or three days before the plaintiffs' complaint and notice were filed, and contained a correct description which had been allowed by amendment. They had issued execution and the

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sheriff was preparing to sell when the referee's report in this action was filed. The referee found that Bunnell & McLaughlin had no lien upon the premises, and awarded judgment of sale and foreclosure in favor of the other lienors, any surplus obtained to be paid to the general assignee of Myers. At this stage of the difficulty the present plaintiffs obtained an order to show cause why Bunnell & McLaughlin should not be restrained from enforcing their judgment. This order was founded upon affidavits. It came on to be heard on the same day of plaintiff's application for judgment, and was accompanied by a stay of proceedings or preliminary injunction granted at the same time with the order. Judgment in the action was awarded in favor of the plaintiffs and duly entered. That judgment gave them no relief by way of injunction restraining the enforcement of the prior action. If in their complaint they set out the facts and asked for an injunction, that relief was refused them on the final judgment. If they did not set out the facts, and ask for the needed restraint, of course they could not have it in the judgment. Undoubtedly they did not, for they claim to have discovered a fraudulent alteration of the notice of lien after their own action was commenced. Their judgment was entered on the fifteenth day of March, which was also the return day of the order, but the permanent injunction was not then awarded. The decision allowing it seems to have been made on the twenty-first of March, and the order was entered as having been granted at a Special Term held on the thirtieth of March. On these facts we are met by the question whether a final and permanent injunction can in any case be granted on motion and by a mere order when no action between the parties is pending, but both actions covering the controversy have gone to final judgment.

Under the law of this state there is no authority for such an order. The Code has abolished the writ of injunction and substituted as a provisional remedy an injunction granted by an order. (Code of Civil Pro. § 602.) It can be awarded only in the cases and in the manner specifically prescribed, and is impliedly forbidden in any others. (*Fellows v. Heer-*

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mans, 13 Abb. Pr. [N. S.] 9.) Even where, after judgment, there has been an appeal the previous temporary injunction is abrogated by the judgment, and any new or further restraints must be contained in the final judgment or order, or cannot be granted at all. (*Gardner v. Gardner*, 87 N. Y. 18; *People ex rel. v. Randall*, 73 id. 416; *Spears v. Mathews*, 66 id. 128.) The rule is easily justified on principle. An injunction by order is a provisional remedy and temporary in its character. It assumes a pending litigation in which all questions are to be settled by a judgment, and operates only until that judgment is rendered. If by that a permanent injunction is granted, the temporary one is, of course, ended, and equally so if a permanent injunction is in the end denied. The order here appealed from cannot be sustained as a provisional remedy under the Code, for it conforms to none of the necessary conditions.

But a permanent injunction is in no sense a provisional remedy. It is always and must be final relief. A court of equity may grant it in an action where the pleadings show its necessity, and the remedy is asked as an element of the final relief sought; but after judgment which does not award it, and which judgment is a final disposition of the action, there can be no permanent injunction granted upon affidavits and an order. In *High on Injunctions* (§ 1591) it is said that there is no precedent for granting a permanent injunction upon affidavits. There may be exceptions to that rule, but, when examined, most of them will appear to be cases in which the injunction was not final and permanent, or in which the action was still pending although an interlocutory judgment had been rendered. The case of *Travis v. Myers* (67 N. Y. 542) is an illustration. The action was against an assignee for the benefit of creditors to close up his trust. After a decree for an accounting, an injunction restraining suits at law was granted on motion. The court described the decree as interlocutory, so that the action was still pending and not ended by a final judgment which itself granted no restraint. It is possible, also, that such an injunction should be regarded as rather provisional than permanent, and intended merely to protect

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the court's possession of the assets to be distributed until realized and finally divided. (*Thompson v. Brown*, 4 Johns. Ch. 619; *Atty. Gen. v. Guard. Mut. Life Ins. Co.*, 77 N. Y. 272.) But cases of this character, whether regarded as exceptional or not, furnish no authority for an injunction granted upon a motion, and founded on affidavits, which is permanent and final in its character, and assumes after a judgment has been rendered which imposes no restraint and reserves no right to apply upon the foot of the decree, to stay and enjoin finally and entirely the enforcement of a judgment in another court. That relief, subject, perhaps, to possible exceptions resting upon peculiar grounds, can only be given in an action properly brought and upon pleadings which warrant the relief.

There was, therefore, in this case no jurisdiction to make the order appealed from. Bunnell & McLaughlin had a regular judgment of foreclosure against Myers and could enforce it against him. It did not bind or affect the present plaintiffs, as it respected their liens. If for any sufficient reason they desired to prevent its enforcement, they should have served an amended or supplemental complaint charging the judgment of the District Court to have been fraudulent; or if that relief in the pending action could not have been given by reason of its peculiar character, then they should have brought a new action to set aside or restrain the judgment of which they complained. If that action could not be maintained, it would be because the appellants' judgment was good against Myers, and could be enforced against him, and not good as against the lienors in the Common Pleas, who could pursue their own remedy unaffected by it. Those suggestions, however, would be equally an answer to an injunction sought on motion. Without discussing those questions, it is sufficient for present purposes to hold that the injunction granted was permanent and final, and beyond the authority of the court to grant on a mere motion founded upon affidavits.

The order should be reversed, with costs.

All concur.

Order reversed.

Statement of case.

JULIA F. KIRTZ, as Administratrix, etc., Respondent, v.
HEZEKIAH PECK, Appellant.

Where, upon a jury trial, each party asks that a verdict be ordered in his favor and neither asks to go to the jury upon any question of fact, the court is authorized to find upon the facts, and if there is any evidence to sustain its finding, it is conclusive here; by requesting the court to determine the case as one of law, a party waives his right, if any, to go to the jury.

In an action upon a promissory note for \$1,500, it appeared that the note was given as the consideration for a contract, whereby the payee, among other things, agreed that *when* the maker "shall pay" the \$1,500 she "shall release and discharge" him from all claims, etc. *Held*, the execution of the release was not a condition precedent to payment, nor was defendant entitled to a concurrent performance, but the payment was to precede the release; also, that, upon payment, the contract itself would operate as a release.

The defense of a failure, on the part of the payee, to perform was not set up in the answer. *Held*, that if it was available, it should have been pleaded, and because of failure to set it up in the answer it was properly excluded.

So long as the purchaser of lands remains in possession under his deed he has no defense to an action for the purchase-price. His remedy in case of failure or defect in title is by action on the covenants in his deed or contract.

(Argued March 11, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 14, 1887, which affirmed a judgment in favor of plaintiff, entered upon a verdict directed by the court.

The nature of the action and the material facts are stated in the opinion.

J. Decker for respondent. When a defendant requests the court to direct a verdict in his favor, he thereby assumes that there is no dispute as to the facts, and substitutes the court in the place of the jury, and he is concluded by its decision. (*Provost v. McEncore*, 102 N. Y. 650; *Ormes v. Dauchy*, 82 id. 443; *Colligan v. Scott*, 58 id. 671; *Koehler v. Adler*, 78 id. 287; *O'Neil v. James*, 43 id. 85; *Barnes v. Rernie*, 12 id.

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18; *Winchell v. Hicks*, 18 id. 558; *Marine Bk. of N. Y. v. Clements*, 31 id. 43; *Strong, Receiver, v. N. Y. L. M. Co.*, 6 Hun, 528, 529; *People v. Clark*, 8 N. Y. 74; 49 id. 384, 671; 47 id. 313, 568; *Fowler v. M. L. Ins. Co.*, 41 Hun, 360, 361; *Stratford v. Jones*, 97 N. Y. 589.) Every presumption is in favor of the decision, and in reviewing it, such facts as are essential to support it the law will imply, and the court will presume such facts were found and that there was sufficient additional evidence given to justify it. (*Porter v. Smith*, 107 N. Y. 533; 35 Hun, 118; *Spencer v. Chambers*, 39 id. 193; *Hagadorn v. Dodge*, 2 N. Y. S. R. 335; *Howland v. Dodge*, 20 Hun, 472; *Griffin v. Phelps*, 21 N. Y. Week. Dig. 390; *Phillip v. Gallant*, 62 N. Y. 257, 265; *Rider v. Powell*, 28 id. 310, 317; *Myer v. Lathrop*, 73 id. 321; *Day v. Town of New Lots*, 107 id. 149, 157; *Talcott v. Smith*, 20 N. Y. Week. Dig. 562; *Vernol v. Smith*, 63 N. Y. 47; *Grant v. Morse*, 22 id. 323; *Caswell v. Davis*, 58 id. 223; *Perrine v. Hotchkiss*, 2 Sup. Ct. 384; 59 N. Y. 649; *Parsons v. Coleman*, 59 id. 329; *Higbie v. Heath*, 3 Sup. Ct. 783; *Dalzell v. Raw*, 1 id. 4; *Provost v. McEncroe*, 102 N. Y. 650; *Marine Bk. v. Clements*, 31 id. 43; *Koehler v. Adler*, 78 id. 287; *Strong v. L. M. Co.*, 6 Hun, 528, 529.) When a court of review is satisfied, from the general scope and tenor of the proceedings on the trial, that a particular fact was not a matter of contest, but was assumed or taken for granted in the conduct of the cause, it will conclude that the fact was as it was assumed to be. (*Dawley v. Brown*, 79 N. Y. 394; *Vail v. Reynolds*, 42 Hun, 647; *Paige v. Fazackerly*, 36 Barb. 393; *Hill v. Hermans*, 17 Hun, 47; *Smith v. Hill*, 22 Barb. 656.) There was a complete execution of the contract on the part of the plaintiff, except only as to the releases, and being partially performed on her part, it was not a case of a total failure of consideration. (*McConihe v. Fales*, 107 N. Y. 404, 407, 408; *Ryerson v. Willis*, 81 id. 277, 279, 280; *Parkinson v. Sherman*, 74 id. 88, 92; *Tilyou v. Reynolds*, 108 id. 559, 562; *Woodruff v. E. R. Co.*, 93 id. 609; *Thorp v. Keokuk Coal Co.*, 48 id. 253; *York v. Allen*, 30 id. 104; *Linsey v. Fergu-*

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son, 3 Lans. 196; 49 N. Y. 623; *Stevenson v. Maxwell*, 2 id. 416; *Viele v. T. & B. R. R. Co.*, 20 id. 186, 187; *Gale v. Nixon*, 6 Cow. 445; *Paine v. Ladue*, 1 Hill, 116; 1 Saund. 320; 5 Wend. 496; 14 id. 219; *Lewis v. McMillan*, 41 Barb. 420; 3 Lans. 199; *Spiller v. Westlake*, 2 B. & Ad. 155; 22 Eng. C. Law, 49; *Freeligh v. Platt*, 5 Cow. 494; *Moggridge v. Jones*, 14 East, 486; *Chapman v. Eddy*, 13 Vt. 205; 1 Parson's Contracts, 203, note 2; Parsons on Bills and Notes, 203; *Wright v. Delafield*, 23 Barb. 498; 49 N. Y. 626; 3 Lans. 199; 7 id. 87; 7 Hun, 246; *Lamerson v. Marvin*, 8 Barb. 9; *Tompkins v. Hyatt*, 28 N. Y. 353; *Harris v. Troup*, 8 Paige, 423.) If the defendant has derived any benefit under the contract, though less than he expected to receive, he cannot rescind it. (*Whitney v. Lewis*, 21 Wend. 134, 135; *Tallmadge v. Wallis*, 25 id. 117.) Defendant must show, to sustain his defense, that the plaintiff is in default. To do that he must put her in default by offering to perform on his part. Until he does that he is in default himself, and he cannot charge her with default when he is himself in default. (*Robb v. Montgomery*, 20 Johns. 15, 19; *Hudson v. Hubbard*, id. 24, 27; *Fuller v. Hubbard*, 6 Cow. 13, 17, 19, 20; *Fuller v. Williams*, 7 id. 53.) The payment of the note and the execution of the releases are not dependent and concurrent or independent and separate obligations. (*Lewis v. McMillan*, 41 Barb. 420, 429; *Pratt v. Gulick*, 13 id. 297, 300; *Whitney v. Lewis*, 21 Wend. 133; *Slocum v. Despard*, 8 id. 615; *Thompkins v. Elliott*, 5 id. 496; 97 N. Y. 408; *Betts v. Perine*, 14 Wend. 220; *Robb v. Montgomery*, 20 Johns. 15; *Seers v. Fowler*, 2 id. 272; *Barruco v. Madam*, Id. 145; *Havens v. Bush*, 2 id. 387; *West v. Emmons*, 5 id. 179; *Close v. Miller*, 10 id. 94; *Champion v. White*, 5 Cow. 510, 511; 97 N. Y. 408; *Pordage v. Cole*, 1 Saund. 320; *Thorp v. Cole*, 12 Mod. 455; *Spiller v. Westlake*, 2 B. & Ad. 155; 22 Eng. C. Law, 49; *McMahon v. N. Y. E. R. R. Co.*, 20 N. Y. 463; *Morehouse v. Second Nat. Bk. of Oswego*, 98 id. 504; *Acer v. Hotchkiss*, 97 id. 408; *Dowdney v. McCullon*, 59 id. 370; *Morris v. Sliter*, 1 Denio, 59; 48 N. Y. 252.)

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J. M. Dunning for appellant. The payment of the note and the delivery of the conveyances of the land were to be simultaneous acts, and it, therefore, follows that the covenants were dependent and the plaintiff was not entitled to recover until the conveyances were delivered. (*Frey v. Johnson*, 22 How. 316; *Beecher v. Conradt*, 13 N. Y. 108; *Rugg v. Moore*, 1 Cent. R. 362; *Clay Com. Tel. Co. v. Root*, 2 id. 340; *Kelly v. Ins. Co.*, 5 id. 484; *Higham v. Harris*, 5 West (Ind.) 649; *Lucesco Oil Co. v. Brewer*, 66 Pa. St. 351, 355; *Morgan v. McKee*, 77 id. 228; *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 463; *Hoag v. Parr*, 13 Hun, 95; *Green v. Reynolds*, 5 Johns. 207; *Jones v. Gardner*, 10 id. 266; *Frisbee v. Hoffnagle*, 11 id. 50; *Gazeley v. Price*, 16 id. 266; *Parker v. Parmelee*, 20 id. 131, 134; *Williams v. Healey*, 3 Den. 363; *Holmes v. Holmes*, 12 Barb. 137; *Culver v. Brough*, 21 id. 324; *Devine v. Devine*, 58 id. 269; *Durham v. Mann*, 8 N. Y. 508; *Lester v. Jewett*, 11 id. 453; *Tipton v. Feitner*, 20 id. 423, 425; *Grant v. Johnson*, 5 id. 247; *Kusham v. Van Vranken*, 14 N. Y. Week. Dig. 417; *Johnson v. Wygant*, 11 Wend. 48; *Reab v. McAllister*, 8 id. 110; *Latton v. Vail*, 17 id. 188; *Whitney v. Lewis*, 21 id. 131; *Tallmadge v. Wallis*, 25 id. 117; *Greenby v. Cheevers*, 9 Johns. 126; *Judson v. Weiss*, 11 id. 525; *Tucker v. Woods*, 12 id. 190; *Ellers v. Haskins*, 14 id. 363; *Batterman v. Pierce*, 3 Hill, 177; *Camp v. Morse*, 5 Denio, 161; *Burwell v. Jackson*, 9 N. Y. 535; *Smith v. Brady*, 17 id. 173; *Catlin v. Tobias*, 26 id. 222.) There was also a total failure of consideration. (*Jones v. Gardner*, 10 Johns. 267; *Kusham v. Van Vranken*, 14 Week. Dig. 417; *Grant v. Johnson*, 5 N. Y. 247; *Eddy v. Davis*, 32 Week. Dig. 468; *Fletcher v. Button*, 4 N. Y. 396; *Lewis v. McMillan*, 41 Barb. 420.)

RUGER, Ch. J. Upon trial at circuit, after evidence given on both sides, the court directed a verdict for the plaintiff. The defendant requested a verdict to be ordered in his favor, and the plaintiff made a similar demand on her behalf. The court

granted plaintiff's request and denied that of defendant, and the case comes here upon the exception to the ruling of the court.

Neither party asked to go to the jury upon any question of fact, and if, therefore, the evidence presented any such question, the court was authorized, by the mode in which the case was tried, to find thereon, and if there was evidence to sustain the finding, it is conclusive upon the parties on this appeal. By requesting the court to determine the case as one of law, the party waived his right, if any, to go to the jury upon questions of fact, and submitted all questions involved to the determination of the court.

The action was originally brought by Jane A. Bush, the payee of a promissory note for \$1,500, made by defendant, dated May 27, 1875, and payable March 1, 1876, with interest. The original plaintiff died and the action was revived in the name of her administratrix. The defense set up by the answer was an agreement between the parties, made on the 19th day of May, 1875, reciting that the defendant *had theretofore purchased a farm of the plaintiff's intestate* and her husband, and was unable to obtain possession thereof, and that in order to avoid trouble, vexation and delay, the defendant had compromised the dispute at the sum of \$1,500, which was the same money mentioned in the complaint; and that it was agreed that the plaintiff, in consideration of said \$1,500 to be paid, would execute and deliver to said defendant a quit-claim, release and discharge of the said defendant from all claims whatsoever, and all interest in said premises theretofore conveyed by her and her husband to the defendant; "that said \$1,500 was not to be paid to said plaintiff until said Jane A. Bush and her husband should execute and deliver to said defendant a release and discharge of said Peck from all claims, dues and demands which they or either of them have or had against said defendant," and that said plaintiff had neglected and refused to execute and deliver such release or discharge. Other defenses were also set up by way of counter-claim, but, as they were unproved on the trial, they present no question on this appeal.

The defense presented by the answer was, therefore, the

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non-performance by the plaintiff's intestate of a covenant made by the contract a condition precedent to the payment of the note, and a refusal to execute and deliver a quit-claim and release of her interest in the land which was the subject of the agreement. This defense was wholly unproved on the trial. The defendant did, however, put in evidence a sealed written agreement between himself, as party of the first part, and plaintiff's intestate, of the second part, dated May 19, 1875, whereby it was agreed "that the said party of the second part, for and in consideration of the sum of fifteen hundred dollars *to her in hand paid*, in manner as hereinafter stated, does hereby agree to release, quit-claim and set over unto the party of the first part all her right, title and interest in the premises *heretofore conveyed by the party of the second part and her husband to the party of the first part*; the party of the first part does hereby agree that the party of the second part may remain in possession of the house in which she now lives, and to have the use of the garden connected with said house until the first day of April next, at which time the party of the second part does hereby agree to surrender said premises to the party of the first part; and it is also agreed by and between the parties to this agreement, that the party of the first part is to take possession of all of said premises, with the exception of the house and garden aforesaid, and the party of the first part is to have all the spring crops that has been sown and put in on said premises; the party of the second part does also agree to procure her husband's release, *if any he has*, to said premises. *It is understood and agreed * * ** that *when* the party of the first part shall pay the said fifteen hundred dollars, as aforesaid, the party of the second part and her husband shall release and discharge the party of the first part from all claims, dues and demands which they, or either of them, have against the party of the first part." The defendant proved that the note and contract were executed at the same time.

The defendant also put in evidence two certain warranty deeds, dated October 29, 1872, from the plaintiff's intestate and her husband, purporting to convey in fee certain lands in

the town of Parma, Monroe county, to the defendant, being the land referred to in the contract. It will be seen that the agreement proved differed in material respects from that set up in the answer. The contract proved neither provided a condition precedent to the payment of the consideration or for the execution and delivery to the defendant of a quitclaim, release and discharge of plaintiff's interest in the lands. The contract shows a present executed release of such interest.

Upon this evidence the defendant now makes the point that the note sued on and the agreement constituted parts of the same contract, and that the obligations respectively assumed thereby were mutual and dependent, and that no action can be maintained by the plaintiff upon the note without showing performance of the contract or an offer to perform on her part. This defense was not set up by the answer, neither do we think it was maintainable if it had been. We think the obligations of the contract were, so far as unexecuted, independent covenants. The law is undoubtedly well settled that where the covenants between the parties are mutual and both parties are to perform at the same time, the covenants operate as dependent obligations, and neither can maintain an action until he has performed or tendered a performance of his part of the agreement. But when it appears from the terms of the agreement, or the nature of the case, that the things to be done were not intended to be concurrent acts, but the performance of one party was to precede that of the other, then he who has to do the first act may be sued although nothing has been done or offered to be done by the other party. (*Morris v. Sliter*, 1 Denio, 59; *Williams v. Healey*, 3 id. 366.) The determination of the question, therefore, depends upon the construction of the contract. We think the language of this agreement, fairly and reasonably construed, implies that the payment of the money was to precede the delivery of the release or discharge claimed as a defense. There is no language in the contract providing a specific time for the delivery of the release and discharge, but it may be required if not already executed at any time after payment. Its language is *when* the money is paid

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the said Jane A. Bush and her husband shall release and discharge the party of the first part from all claims, dues and demands which they or either of them may have against him. (*Morris v. Sliter, supra.*) The word "when" is used in the sense ascribed to it by lexicographers as "at a time after," and as thus used the case of *Morris v. Sliter (supra)* is in point. The payment of the money is not provided for by the agreement at all, but it is either assumed that it has been already paid, or, if not, that it is to be arranged by an independent agreement "as hereinafter stated;" but no such arrangement is thereafter specified. The execution of a negotiable note, payable to whoever might hold it at maturity, is some evidence that no concurrent performance was intended. The contract does not, in terms, refer to the note; neither does the note refer to the contract, and it is only by extrinsic evidence that any connection between them is shown. While this circumstance is not conclusive upon the question of concurrent obligations, it affords some evidence of the intention of the parties. The agreement is quite inartificially drawn, and leaves its real purpose and object the subject of much doubt. Neither the answer nor the contract show any reason for the provision for a further conveyance of lands, which the defendant in both alleges that he already holds under an executed conveyance from the plaintiff and her husband. The reason, however, appears in his evidence on the trial, that he held such conveyance as security for loans of money. It was, therefore, important that he should secure a release of the plaintiff's equity of redemption. This, we think, the contract gives him. It was executed under the hands and seals of the parties, and reads that "in consideration of the sum of fifteen hundred dollars, to her in hand paid," she "does hereby agree to release, quit-claim and set over" all her right, title and interest in the premises heretofore conveyed by her and her husband to the party of the first part.

We think, within the authorities, this operates as a conveyance *in presenti* of the plaintiff's interest in the land. (*Emery v. Hitchcock*, 12 Wend. 156; *Jackson v. Blodgett*, 16 Johns.

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172.) The receipt of the consideration is acknowledged by the plaintiff, and the defendant became thereby entitled to a present release of the plaintiff's equity of redemption. We think it was the intention of the parties, so far as the land was concerned, that this agreement should operate as a present release and conveyance. There were other covenants which were doubtless executory, among which was that one providing for the husband's release of any right to such premises, *if any he has*. The latter is a conditional covenant, and it nowhere appears that the husband had or claimed any interest in such lands. This covenant was evidently inserted as a cautionary measure by way of further assurance, which might or might not be desirable for defendant to possess. It was optional with him to require its performance or not as he saw fit. The agreement itself contained all that was, in fact, material for the defendant to have, as it conveyed all interest that the apparent owner of the premises had in the land, and also operated as a release of any claims, dues or demands which she might then have against the defendant. When the agreement was drawn, it was evident that it contemplated the present payment of the money, for it expressed it to be in hand paid, and the substitution of the note was quite obviously an afterthought, although claimed to have been delivered at the same time as the agreement. When the note matured the defendant seemed to have the same view, for he commenced making small payments thereon, which continued for a year, without apparently any objection or claim that he was entitled to a concurrent performance of the obligations.

We are, therefore, of the opinion that the promises were independent and that it was not only unnecessary for the plaintiff to show performance of such covenants to entitle her to maintain an action on the note, but no such defense was stated in the answer, and it was, therefore, upon both grounds, properly overruled by the trial court.

The defendant also claims that the consideration of the note has entirely failed. This defense, also, is not only unpleaded, but is entirely unsustained by proof. It was

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assumed on the trial by all parties that the defendant had taken possession of the lands conveyed, as the contract provided, and there is sufficient evidence in the case to support such assumption. The contract provided for the surrender of possession of the premises two years before the action was commenced, and no allusion is made in the answer to any breach of the contract in this respect, although assuming to set up such breaches as constituted a defense.

The answer also sets up, as a counter-claim, an indebtedness for rent of the farm for two years and a half previous to the surrender, but none after that time. The defendant was also sworn on the trial and made no attempt to show a breach of the contract in respect to the surrender of the premises. Under these circumstances it seems that the trial court was justified in assuming the performance of the contract in all respects, except those specifically controverted by the defendant.

Assuming, therefore, the possession of the premises by the defendant under his deeds and the contract, he had acquired such an interest in the lands as would constitute a good consideration for a promise to pay their purchase-price. So long as the purchaser of lands remains in possession under his deeds, he has no defense to an action for the purchase-price. (*Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; *McConihe v. Fales*, 107 id. 404; *Ryerson v. Willis*, 81 id. 277; *Parkinson v. Sherman*, 74 id. 88.)

An action on the covenants of his deed or contract will give him all the relief to which he is entitled, but to uphold a defense to his agreement to pay the purchase-price would enable him to hold the land discharged of the obligation in consideration of which he acquired it. The law does not tolerate such an injustice and, therefore, requires the surrender of the possession of land, or proof of an eviction therefrom, before permitting the defense of failure of consideration to prevail.

We are, therefore, of the opinion that the judgment of the courts below should be affirmed, with costs.

All concur.

Judgment affirmed.

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JULIUS T. ASCHE et al., as Executors, etc., Respondents, v.
 ESTELLE ASCHE, Individually and as Executrix, etc.,
 Appellant, et al.

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The will of A. devised and bequeathed all his real and personal property, after the payment of debts and funeral expenses, to his executors, in trust, to invest and keep invested the proceeds in certain specified interest-bearing securities, to pay the income of a certain small part thereof to his mother during life, and the balance to his widow during life, including that bequeathed to the mother after her death, and after the death of the wife the remainder over to the testator's surviving children, share and share alike. In an action for the construction of the will, it appeared that the widow and two children survived him, one of whom died thereafter and before the commencement of the action. The widow claimed the benefit of the provision made for her in the will and also dower in the testator's real estate, and that upon the death of her child she, as next of kin, became entitled to one-half of the remainder provided for each child and to an absolute interest in possession of one-quarter of the estate by reason of a merger of her legal and equitable interest therein. *Held*, untenable; that the creation of a trust for her life was inconsistent with an implied right on her part to manage and control any part of the estate; that from the fact that the testator gave her the income of all his estate it was to be implied that he did not expect her also to take dower; and that the will indicated the testator's intent that all his property should be converted into money; that the widow's interest in the trust estate did not merge in that acquired on the death of her child; that there could be no merger because of the existence of the trust estate.

Where there is a manifest incompatibility between the provision for a widow in a will and dower, the widow is put to an election between them.

In equity the union of legal and equitable estates in the same person does not effect a merger unless such was the intention of the parties and justice and equity require it.

Merger is accomplished in law when two or more estates in the same property unite in the same person, and when these estates comprise the whole legal and equitable interest in such property, and so the holder becomes the absolute owner; it cannot take place where there is an intermediate estate.

The provisions of the Revised Statutes (1 R. S. 727 § 471), indicating the circumstances under which the union of legal and equitable estates extinguish the latter, are, in principle, equally applicable to trusts of personal property. Also, *held*, that the widow by the death of her child acquired a future estate, dependent upon the precedent estate of the trustees, which may be devised but cannot be enjoyed in possession; that it was the intent of the testator to put the *corpus* of the fund beyond the hazard of impair-

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ment and waste during the life of his widow, and this could not be defeated or affected by the acquisition by her of the estates in remainder. The necessity of a conversion of realty into personalty, to accomplish the purposes expressed in a will, is equivalent to an imperative direction to convert, and effects an equitable conversion. Reported below, 47 Hun, 285.

(Submitted March 15, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 22, 1888, which affirmed a judgment in favor of plaintiffs, entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts are sufficiently stated in the opinion.

Joseph Fettretch for appellant. The appellant is entitled to the share of her deceased child discharged from all claim of the trustees and executors. (1 R. S. [Edm. ed.] 680, § 67; *In re De Kay*, 4 Paige Ch. 403; *Bellanger v. Shafer*, 2 Sandf. Ch. 295, 296.) The claim of no person taking any interest during the widow's lifetime is in conflict with the appellant's right of dower. (*Lewis v. Smith*, 9 N. Y. 502, 511, 512; *Sanford v. Jackson*, 10 Paige Ch. 269; *Havens v. Havens*, 1 Sandf. Ch. 324, 328, 329; *Adsit v. Adsit*, 2 Johns. Ch. 448; *Church v. Bell*, 2 Den. 430; *Konvalinka v. Schlegel*, 25 Week. Dig. 462.)

Simpson & Werner for plaintiffs, respondents, and *John C. Gluck*, guardian *ad litem*, for infant defendant, respondent. The trust life estate of the money did not merge in the remainder which devolved upon the widow on the death of her child. (*James v. Morey*, 2 Cow. 246; 6 Johns. Ch. 417; *Willard v. Mullen*, 5 Hun, 572; *Champney v. Coope*, 32 N. Y. 543.) The widow having elected to take the provision in her favor, the trustees take the entire estate free from her dower. (1 Roper on Husband and Wife, 582; *Matter of Zahrt*, 94 N. Y. 605; *Savage v. Burnham*, 17 id. 561; *Le Fevre v. Tool*, 84 id. 95; *Tobias v. Ketcham*, 32 id. 319; 2 Jarman on Wills [Rand. & Tall. ed.] 22.)

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RUGER, Ch. J. This is an action between the several executors of the will of Jacob Asche and his widow and legatees to obtain a construction thereof by the court. The will, in substance, devised and bequeathed all of his real and personal property, after the payment of debts and funeral expenses, to his executors in trust to invest and keep invested the proceeds thereof in United States bonds or in bonds of the state or city of New York, or in bonds secured by first mortgage on real estate in the city of New York, and to pay the interest or income of a certain small part thereof, determinable by the gross value of his estate, to his mother during her life, and to pay to his widow during her life the interest and income upon all the rest, residue and remainder of his estate, including that bequeathed to his mother, upon her death, and after the death of his wife remainder over to his surviving children, share and share alike. At the testator's death his wife and two children survived him. One of the children died after the testator and before the commencement of this action. The widow now claims the benefit of the provision made for her by the will and also dower in the real estate owned by the testator at his death. She contends that upon the death of her daughter she became entitled, as next of kin, to one half of the remainder provided for such child, and to an absolute interest in possession of one quarter of the estate by reason of an alleged merger of her legal and equitable interest therein.

These questions are to be determined by the intentions of the testator as indicated by the language of the will and the circumstances surrounding its execution. The general scheme of the will seems to be antagonistic to the claims of the widow. The creation of a trust estate mainly for the benefit of his wife, which was to endure so long as she lived, is inconsistent with an implied right on her part to manage and control any part of the property devised. The testator excluded his wife from the control of his personal estate, and the reason influencing this provision would seem to indicate a similar intention in regard to his real estate. The circumstance that the testator substantially made his wife the sole beneficiary of the trust,

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thus giving her the income of all of his estate, gives force to the implication that he did not suppose she would also take dower.

That the testator intended the conversion of all of his property into money and its investment in interest bearing securities, which should remain under the exclusive management and control of his trustees during the life of the widow, is clearly to be implied from the purposes expressed in the will. Those purposes can be effected only in the mode directed, and the legal estate given to the trustees must necessarily continue so long as the objects of the trust remain unperformed. The necessity of a conversion to accomplish such purposes, is equivalent to an imperative direction to convert, and effects an equitable conversion of the property. (*Hobson v. Hale*, 95 N. Y. 588; *Chamberlain v. Taylor*, 105 id. 185.) This conversion was essential in order to determine the amount of income to which the testator's wife and mother should be respectively entitled, and is inconsistent with the existence of a life estate in any part of the real property in the wife. The absolute power of sale conferred upon the executors was evidently not intended to be limited or impaired by an inability on their part to convey a good title to the whole of such real estate, and the purposes of the will required such sale to be made unhampered by obstructions which might be interposed by conflicting interests in the property.

Although there is no express language providing that the bequest to the widow shall be in lieu of dower, yet where there is a manifest incompatibility between such provision and dower, it is held that she cannot take both, and is put to her election between them. (*Vernon v. Vernon*, 53 N. Y. 351; *Konvalinka v. Schlegel*, 104 id. 125; *Matter of Zahrt*, 94 id. 605.) To hold otherwise would impair the general scheme of the will and create an incompatibility of provisions which should preclude the widow from taking dower. It is also quite clear that the widow's interest in the trust estate did not merge in the legal estate which she acquired by the death of her daughter. In equity the union of legal and equitable

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estates in the same person does not effect a merger unless such was the intention of the parties, and justice and equity require it. (*Smith v. Roberts*, 91 N. Y. 470; *Champney v. Coope*, 32 id. 543.) Merger is accomplished in law when two or more estates in the same property unite in the same person, and when such estates comprise the whole legal and equitable interest in such property, the person holding them becomes the absolute owner. (*Mickles v. Townsend*, 18 N. Y. 575; Bouv. Institutes, §§ 1993–1995.) Merger requires the existence of two estates, a greater and lesser, and, upon merger taking place, the lesser estate is said to be extinguished and absorbed in the greater; but this cannot take place where there is an intermediate estate. Merger takes place by virtue of unity of seizin. (*Mickles v. Townsend*, *supra*.) There could, therefore, be no merger here because of the existence of a valid trust with the right in the trustees to the possession of the trust fund for the purposes of management and control during the life of its beneficiary. The trust must exist so long as the widow lives, and during her life there could be no merger. She has no estate in the subject of the trust. She had an interest in it as beneficiary, but it was essential to the existence of that interest that the trust estate should be maintained. The destruction of the trust would necessarily terminate her interest therein, and there would then be nothing to merge. As was held in *Parling v. Hardy* (Skinner, 62): “Where an estate and a mere right in the land, not an estate, meet in the same person, the merger will not take place, because such an interest is not an estate.”

A merger cannot take place except by the extinguishment of the lesser estate, and in this case to extinguish the lesser interest would leave the widow with a remainder alone which could take effect in possession only upon her death. (Bouvier's Institute, § 1995.) The provisions of the Revised Statutes indicating the circumstances under which the union of legal and equitable estates extinguishes the latter, are, in principle, equally applicable to trusts of personal property. Section 47 of the chapter on Uses and Trusts, as was said by

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the chancellor in the *Matter of De Kay* (4 Paige, 403), provides that every person who is entitled to the *actual possession of lands* and to the receipt of the rents and profits thereof in law or in equity, is deemed to have a legal estate therein, commensurate with his beneficial interest in the premises, except in those cases where the estate of the trustee is connected with *some power of actual disposition or management*. Here the widow is not only not entitled to the possession of the trust fund, but there is also a valid trust imposing upon its trustees the duties of actual disposition and management which will continue as long as the fund exists and the widow lives.

It is argued by the appellant that upon the death of both children the widow would become, as heir to her children, and the sole beneficiary in the trust, entitled to the immediate possession and control of the trust fund. We do not think so. The object of the creation of the trust estate would not then have been accomplished. The intention of the testator to put the *corpus* of the fund beyond the hazard of impairment and waste during the life of his wife cannot be defeated or affected by the acquisition by her of the estates in remainder created by the will. The necessity for the maintenance of the trust would remain in full force notwithstanding the widow's succession to the rights of her children. By such acquisition she would acquire a future estate, dependent upon the precedent estate of the trustees, but which she cannot enjoy in possession. She might devise it, but cannot possess an estate conditioned upon her own death.

In view of the full and satisfactory opinions of the courts below, we have already extended our discussion of the case beyond the limits which necessity required and those which we intended.

The judgment appealed from should be affirmed, with costs of all parties to be paid from the estate.

All concur.

Judgment affirmed.

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117	94
113	238
126	558

MARGARET C. WALLACE, as Executrix, etc., Respondent, v.
MOSES STRAUS, Appellant.

W., plaintiff's testator, a stockbroker, was carrying certain stock for S. on a margin; the margin having become inadequate, defendant executed to W. a written guaranty for any loss sustained "by reason of the holding and carrying of said stock." The stock at that time was worth in the market more than the amount due W. Subsequently, after notice to S. and defendant to take up and pay for the stock, and that in case of failure, the same would be sold at public auction at a time and place specified, the stock was sold in accordance with such notice. In an action upon said guaranty, *held*, that it was not a guaranty of collection requiring the remedy against the principal debtor to be first exhausted before enforcing it; but it was a loss as ascertained by a sale of the stock which was contemplated by the parties as the subject of the guaranty, and plaintiff was entitled to recover the loss as so ascertained.

Upon the trial S. was called as a witness by defendant, and having testified that he gave instructions to W. in November, 1881, with reference to a sale of the stock, was asked to state those instructions. This was objected to on the ground that the witness, being the principal debtor, was interested in the event of the action and so was incompetent to testify to a personal transaction with W. under the Code of Civil Procedure (§ 829.) The objection was sustained. It did not appear that S. had received any notice from defendant to defend or had undertaken the defense. *Held*, error; that S. was a stranger to the action and not interested within the meaning of said Code; that before he could be bound by the judgment he must have been placed, by formal notice to defend or something tantamount to such notice from the defendant, in a situation calling upon him to assume control of the action, or to aid in its defense, as though a party, with the right to adduce testimony and cross-examine witnesses and appeal from the judgment; that the simple fact that he was called as a witness by his surety did not bind him by the result of the litigation.

(Argued March 15, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court, entered upon an order made January 23, 1888, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court without a jury.

This was an action upon the following guaranty:

"Whereas, Ferdinand Straus is indebted to F. B. Wallace in the sum of eleven thousand five hundred and fourteen $\frac{22}{100}$

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dollars, with interest from August 16, 1881, for which the said Wallace holds as collateral security one hundred shares of the stock of the Central Pacific Railway Company and one hundred shares of Ohio Central Railroad Company, and whereas the margin on said stock is inadequate.

"Now, therefore, in consideration of one dollar in hand, paid by said Wallace, I hereby agree to guarantee said Wallace or the new firm of F. B. Wallace & Co., if said account is transferred to the books of said new firm, from any loss they may sustain by reason of the holding and carrying of said stock.

"Witness my hand and seal this 25th day of October, A. D. 1881.

"MOSES STRAUS." [SEAL.]

Wallace, to whom the guaranty was given having, died, plaintiff, his executrix, served a notice on the defendant and on said Ferdinand Straus, on January 7, 1886, to take up and pay for said stock, and in case of failure so to do that she would sell the same on the 20th of January, 1886, at 12.30 P. M., by A. H. Muller & Son, at 29 Liberty street; and, on said sale, the stock referred to in the notice was sold for \$4,109⁹⁸/₁₀₀ net; said amount was credited on the indebtedness, and this suit was brought to recover the balance.

Further facts appear in the opinion.

Stephen C. Baldwin for appellant. The guaranty in question was a guaranty for collection and not of payment, and an action against the guarantor could only be predicated upon the exhaustion of all legal remedies against his principal. (*Craig v. Parkie*, 40 N. Y. 181; *Griffith v. Robinson*, 15 Hun, 344; *Baylies on Guaranty*, 22; *Goldsmith v. Brown*, 35 Barb. 495; *Jones v. Sluckburg*, 1 Barb. Ch. 250; *Keyes v. Tift*, 1 Cow. 98; *Northern Ins. Co. v. Wright*, 20 N. Y. S. C. Rep. 168; 76 N. Y. 445; 14 Hun, 165; *Moakly v. Riggs*, 19 Johns. 69; *Loveland v. Shepard*, 2 Hill, 139; *Hernandez v. Stilwell*, 7 Daly, 360; *Vanderbilt v. Schreyer*, 21 Hun, 537; *Sawyer v. Hascall*, 18 How. 282.) Ferdinand

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Straus, the principal, for whom defendant became guarantor, was not a party or a person interested in the event within the meaning of section 829 of the Code of Civil Procedure. (*Kelly v. Burroughs*, 102 N. Y. 93; *Nearpass v. Gilman*, 104 id. 507; *Hobart v. Hobart*, 62 id. 80; *Hildebrandt v. Crawford*, 65 id. 107; 1 Greenl. on Ev. § 390; *Miller v. Montgomery*, 78 N. Y. 282.)

W. F. Dunning for respondent. While the liability of guarantors is *strictissimi juris* and cannot be extended by construction beyond the plain and explicit language of their contract, yet such contract is subject to the same rules of construction as other contracts; and is to be enforced according to the meaning and intent and in the manner designed by the parties at the time of its execution. (*People v. Lee*, 104 N. Y. 441.) Ferdinand Straus was incompetent, as a witness for the defendant, to testify as to instructions given or as to letters written by him to F. B. Wallace, and the exclusion of such testimony was not error. (*Church v. Howard*, 79 N. Y. 415, 420; 1 Greenleaf on Evidence, § 390; *Lawton v. Sayles*, 40 Hun, 252, 253; *Redfield v. Redfield*, 110 N. Y. 671.)

ANDREWS, J. The primary purpose of the guaranty was to secure the debt owing by Ferdinand Straus to Wallace, if its collection should be deferred. At the date of the guaranty the stock was worth in the market more than the amount of the debt. Wallace could sell at any time on notice and satisfy the debt out of the proceeds. The purpose of Ferdinand Straus in furnishing a guaranty was to avoid a sale and to have the stock carried in expectation of a better market. But the fluctuations incident to such property might hazard Wallace's position, unless he had indemnity that while carrying the stock his security would not be impaired. The stock was the security upon which Wallace relied. The contract indicates this and also that both Wallace and the guarantor, Moses Straus, regarded the stock as the certain and immediate recourse for the payment of the debt. When, therefore, the defendant, instead of guaranteeing the debt, or the payment or collection

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of the debt guaranteed Wallace against any loss by reason of holding or carrying the stock, the guaranty was against a depreciation of the stock which would render it insufficient to pay the debt. It was a loss as ascertained by a sale of the stock which was contemplated by the parties as the subject of the guaranty. This, we think, is the plain construction of the instrument. It was not a guaranty of the collection of the debt so as to require that the remedy against the principal debtor should be exhausted before coming upon the surety. This would lead to an affirmance of the judgment, except for a ruling by the trial judge on a question of evidence.

The defendant called his brother, Ferdinand Straus, as a witness, and he was asked: "Did you give any instructions (to Wallace) in November, 1881, with reference to a sale of these two blocks of stock?" and the question was objected to by the plaintiff's counsel on the ground that the witness being the principal debtor, and the action being against his surety, he was interested in the event of the action and was, therefore, incompetent to testify to a personal transaction with the plaintiff's testator under section 829 of the Code. The court permitted the witness to answer "yes or no," and he answered "Yes." This question was followed by one calling for the instructions given, and the objection being renewed, the court sustained it and excluded the testimony. It must be assumed, in the absence of any objection on that ground, that the testimony offered was material. It is certainly possible that instructions might have been given by Ferdinand Straus to Wallace, the disregard of which would furnish a defense, in whole or in part, to the action.

The question, therefore, is whether the witness was interested in the event of the action, as upon this ground only could the question have been excluded under section 829. The test of the interest which disqualifies a witness not a party, under this section, is stated by CHURCH, Ch. J., in *Hobart v. Hobart* (62 N. Y. 80), in construing a corresponding section of the prior Code, adopting substantially the lan-

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guage in 1 Greenleaf on Evidence (§ 390). He says: "The true test of the interest of a witness is that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain and vested interest, and not an interest remote, uncertain or contingent." The same rule was reiterated in *Nearpass v. Gilman* (104 N. Y. 507). The witness Ferdinand Straus was not interested within the rule. He was not bound by the judgment rendered against the surety. It is plain that the judgment would not determine his liability in an action subsequently brought by Wallace against him to recover the debt or in any way limit it, except that if collected it might operate as payment in full or *pro tanto* of the debt. So if the surety, having paid the judgment, should bring an action for reimbursement, the recovery against the surety would not fix the liability of the principal. The judgment against the surety would not be an adjudication as against Ferdinand Straus, that the surety had incurred any liability for which he was entitled to indemnity. It would be admissible to prove the fact of the judgment, and it would determine the amount of the liability over of the primary debtor to the surety when his liability had been otherwise established. This conclusion results from the "most obvious principle of justice, that no man ought to be bound by proceedings to which he was a stranger." (1 Greenl. Ev. 522.) Ferdinand Straus was, within this principle, a stranger to the suit against the surety. He was not a party, nor, so far as it appears, was any notice given to him by the surety to defend the action, nor had he undertaken the defense. It may be assumed, from the fact that he was called as a witness, that he knew of the pendency of the suit. But before he could be bound by the judgment he must have been placed by the act of the surety in a situation calling upon him to assume the control of the action or to aid in its defense, as though a party, with the right to adduce testimony and to cross-examine witnesses, and to appeal from the judgment. (1 Greenl. Ev. § 523.) The bare fact that he was called as a

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witness by the surety, nothing else appearing, did not bind him by the result of the litigation. It will be found in the cases upon the subject that something more was necessary. There must be formal notice to defend or something tantamount to such notice, given by the surety, or the principal must have assumed the defense of the action, or aided in preparing the defense in order to bind him by the result. (*Barney v. Dewey*, 13 Johns. 224; *Brewster v. Countryman*, 12 Wend. 446; *Chicago v. Robbins*, 2 Black, 418; *Lovejoy v. Murray*, 3 Wall. 1.) In short, no fact determined against the surety in the action, or which might have been determined therein, would, under the circumstances disclosed, when the ruling in question was made, be available to, or would bind the witness in any subsequent action brought against him either by the surety or the creditor Wallace.

We think, therefore, the evidence offered was erroneously excluded, and that for this error the judgment should be reversed and a new trial granted.

All concur.

Judgment reversed.

BENJAMIN S. MILLS, as Executor, etc., Respondent, v. DANIEL R. DAVIS et al., as Administrators, etc., Appellants.

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77	AD*244
e 78	AD*511

As against a promissory note, payable on demand with interest, the statute of limitations begins to run at its date.

It seems the provision of the Code of Civil Procedure (§ 395), declaring that, in order to take a case out of the statute of limitations, an acknowledgment or promise to pay in writing, signed by the party to be charged, is necessary, but that this "does not alter the effect of a payment of principal or interest;" does not change the nature or effect of a part payment. The old rule is recognized and continued and the payment may be proved by oral evidence.

In order to make an indorsement upon a promissory note of part payment made by the holder, without the privity of the maker, competent as evidence to meet the defense of the statute of limitations, it must appear that it was made at the time when its operation would be against the

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interest of the party making it; and so, at least, that it was made before the statute could have operated.

It seems that even then it is a question for the jury as to whether the payment was, in fact, made.

Upon a reference under the statute of a claim by an executor against the estate of a deceased person, which claim was founded upon a promissory note, the defense was the statute of limitations. The note bore indorsements of payment of interest made by plaintiff. Plaintiff himself and two other witnesses who were entitled under the will each to one-third of whatever was collected on the note, were permitted to testify, under objection and exception, that the indorsements were made by plaintiff during the lifetime of plaintiff's testator. *Held*, that the testimony was incompetent under the Code of Civil Procedure (§ 829).

Reported below, 41 Hun, 415.

(Argued March 15, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 23, 1886, which affirmed a judgment in favor of plaintiff and an order confirming the report of a referee.

This was a reference under the statute of a disputed claim against an estate.

The facts, so far as material, are stated in the opinion.

Thomas J. Ritch, Jr., for appellants. Conceding that indorsements on the note are admissible as evidence, there should be legal proof that they are truthful records of the transactions they purport to describe. (*McLaren v. McMartin*, 36 N. Y. 88, 89.) The testimony is perfectly consistent with the fact that the last five indorsements of interest were all made at the same time, and perhaps during the last day of the life of the maker. (*Roseboom v. Billington*, 17 Johns. 186.) The party shall not testify to any personal transaction which he may have had with the deceased concerning a personal transaction against the executor, etc. Nor can his written statement of a transaction which he has had with the deceased be any higher or better evidence than his own oral testimony to the same effect. (Code Civil Pro. § 839; *Roseboom v. Billington*, 17 Johns. 187; *Card v. Card*, 39 N. Y. 317; *Jacques v. Elmore*, 7 Hun, 675; 60 N. Y. 610.) A fact that could not

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be proved by the executor directly cannot be established inferentially by his testimony. (47 N. Y. 554; 4 Hun, 507; 5 id. 468; 16 id. 100; 2 id. 131.)

Thomas S. Strong for respondent. When the indorsements were made the statute of limitations had not attached, and the making of them was against the interest of the party making them. The maker of the note was alive and the note collectible. These facts are sufficient to make them evidence; they raise a question of fact for the jury. (*Roseboom v. Billington*, 17 Johns. 182; *Risley v. Wightman*, 13 Hun, 163; *Smith Lead Cas.* 725.) The executor was not disqualified from testifying. His only interest was his commission as executor, that did not disqualify him. (*In re Wilson*, 103 N. Y. 374.) The testimony of the witnesses is not as to transactions with the deceased maker of the note, but solely as to extraneous facts, nor were the indorsements themselves personal transactions with the deceased maker. (*Pinny v. Orth*, 88 N. Y. 447; *Denise v. Denise*, 110 id. 562; *Lewis v. Merritt*, 98 id. 206; *Wadsworth v. Herrmans*, 85 id. 639.)

DANFORTH, J. The claim which gave occasion for this proceeding was a writing in these words :

"\$300.

SETAUKET, November 17, 1864.

"For value received, I promise to pay to Clarissa Darling, or order, three hundred dollars on demand, with lawful interest.

"ELIZABETH JAYNE."

It does not appear when Clarissa Darling, the payee, died, but letters of administration were issued upon her estate July 10, 1871, and it is stated by counsel for the respondent that the payor, Elizabeth Jayne, died September 10, 1884. Some time between that date and the 12th of March, 1886, the plaintiff, as executor of Clarissa Darling, presented the note as a claim against the estate of Elizabeth Jayne to her executor, and he, doubting the justice of it, a referee was appointed to hear and determine the matter. Upon the trial it appeared that the

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body of the note was written by Mary Bayles, formerly Mary Darling, a daughter of the payee. There was enough evidence to call for the opinion of the referee as to the genuineness of the note, and by his finding that fact is established.

But, although bearing interest and payable on demand, the statute of limitations began running at the date of the note (*Wenman v. Mohawk Ins. Co.*, 13 Wend. 268; *Herrick v. Woolverton*, 41 N. Y. 581; *McMullen v. Rafferty*, 89 id. 456), and, unless something occurred to obstruct its passage, the bar fell in November, 1870, and if raised then, it fell again in 1876, and again in 1882, and was well on its way for the fourth blow, when, after the expiration of more than twenty years from the time an action might have been commenced upon the note, it was, so far as appears from the testimony, for the first time presented to any person or party concerned in its validity, and then was doubted and disputed.

The statute limiting the time of enforcing a civil remedy declares that an action upon a contract must be commenced within six years after the cause of action has accrued (Code of Civil Pro. §§ 380, 382), and that, in order to take a case out of the operation of these provisions, an acknowledgment or promise in writing, signed by the party to be charged, is necessary (Id. § 395); but there is a proviso that this enactment "does not alter the effect of a payment of principal or interest" (§ 395.) There is no suggestion or pretense that by any such acknowledgment or promise, as the statute requires, a new and continuing contract was created, nor is there any allegation or suggestion of payment of any portion of principal, and, therefore, the inquiry before the referee was limited to the single question whether there had been any such payment of interest as would take the demand out of the statute. That fact, if it existed, might be proved in the same manner as before an acknowledgment or a new promise was required to be in writing. The statute changes neither the nature nor effect of part payment, nor does it prescribe any new rule of evidence in regard to it. It merely recognizes and continues the rule as established by the previous decisions of the courts. (*Bank*

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v. *Ballou*, 49 N. Y. 155; *Harper v. Fairley*, 53 id. 442.) It may still be proved by parol. (*Cleave v. Jones*, 6 Exch. 573; *Bank v. Ballou*, *supra*.) There is no testimony of that character showing payment. Although the claimant at once assumed the burden of showing that the case was freed from the statutory bar, the only proofs of payment offered by him were certain writings upon the back of the note, made by himself and reading as follows :

“Interest paid on the within note to Nov. 17, 1868.

“CLARISSA DARLING,

“By B. S. M.”

“Interest paid on the within note to Nov. 17, 1870.”

“Interest paid on the within note to Nov. 17, 1875.”

“Interest paid on the within note to Nov. 17, 1876.”

“Interest paid on the within note to Nov. 17, 1877.”

“Interest paid on the within note to Nov. 17, 1878.”

An indorsement or memorandum of part payment is held competent evidence for the consideration of a jury as showing an acknowledgment of debt and to rebut the presumption of its payment arising from the lapse of time. But in order to render such indorsements admissible, it must appear that when made there was a pecuniary interest with which they were at variance. It was, therefore, held in *Roseboom v. Billington* (17 Johns. 181), that to make such indorsement admissible it must be proven to have been made before the presumption of payment attached. Nothing less has been required from the day of that decision to the present time, and the case is decisive in favor of this appeal. The note then in suit was dated on the 9th day of January, 1808, payable in two years. An action was brought upon it in 1817, and the statute of limitations was interposed as a defense. Upon the trial the plaintiff offered to prove an indorsement on the note in his own handwriting, dated October 18, 1811, acknowledging the receipt of \$30, in part payment of the note. This was objected to and excluded. The defendant had a verdict and the plaintiff brought a writ of error.

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SPENCER, Ch. J., states the question to be "whether an indorsement of a payment on a promissory note, in the handwriting of the payee, without any other evidence of the fact of payment, ought to have been submitted to the jury as proof of the payment, and thereby to take the case out of the operation of the statute of limitations." And, after a discussion of the matter, upon principle and authority, says: "An indorsement, therefore, on a bond or note, made by the obligee or promisee, without the privity of the debtor, cannot be admitted as evidence of payment in favor of the party making such indorsement, unless it be shown that it was made at a time when its operation would be against the interest of the party making it. If such proof be given, it would, I think, be good evidence for the consideration of the jury."

Something more, then, is needed than the indorsement even, to carry the case to the jury. It must appear to have been made by a creditor and at a time when he had no motive to give a false credit, and, at least, before the statute of limitations can have operated. (*Read v. Hurd*, 7 Wend. 409; *Hulbert v. Nichol*, 20 Hun, 459; *Briggs v. Wilson*, De G., M. & G. 12.) And even then it is for the jury to say whether the payment was, in fact, made, and they may inquire, among other things, whether, upon the whole, the interest of the creditor may not be promoted rather than impaired by giving effect to the indorsement, and if so, reject it altogether. In the case at bar it is at this point that the plaintiff's case fails. Of itself neither indorsement has any tendency to show when it was made. It would be equally true whether made on a particular seventeenth day of November or at any other time. It recites or declares a fact, and is consistent as a narrative of a past or an assertion of a present act. Each might have been made after the time when the statute had taken effect. Nor is there extrinsic proof of the time when the indorsements were made, nor evidence of explanatory circumstances.

The plaintiff, under an objection grounded on section 829, and to which I shall later on refer, says the note came into his "possession as a part of the estate of Clarrissa Dar-

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ling, deceased," and that the indorsements of interest are in his handwriting. He was asked by his counsel: "Were all the indorsements made by you during the lifetime of Elizabeth Jayne?" The question was objected to by the defendant, on the grounds that (1) it was leading; (2) was a declaration in his own favor, and (3) inadmissible under section 829. He answered, "They were." The wife of the plaintiff was a daughter of the deceased, and as such entitled to a third of whatever should be received upon the note. She testified to having "seen the note from year to year since her mother's death." Asked by plaintiff's counsel: "Have you seen the writing on the back of this paper?" Answered "Yes, sir." Again asked, "Did you see those writings from time to time as they were made?" Answered, "Yes, sir." Again, "Were they all made during the life of Elizabeth Jayne?" Answered, "Yes, sir." Asked, "The money which was indorsed as received on that note, did any of it go to you?" Answered, "Yes, my share." Question, "When did you receive the last money on it?" Answer, "I don't remember." She says, "I know when the different indorsements were made, only by the note. The note tells how many different indorsements there are on it. I have no knowledge of it, nothing but the note." Although greatly aided by a cross-examination which gave full opportunity to her to indulge in inference and imagination, it could hardly be said that she knew anything of the matter inquired of, except from the plaintiff, her husband, either as to the indorsements or the receipt of money. It is enough, however, that the witness is silent as to when the last indorsement was made. And that is really the only one of importance in this inquiry. Unless that was made within six years of the death of the maker of the note, the rest are of no moment.

But aside from these considerations, and in view of the statute (Code, § 829), which prohibits "a party or person interested in the event" from testifying in his own behalf or interest against the executor of a deceased person concerning a personal transaction between himself and the testator, the

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plaintiff was improperly allowed to testify as to the length of time he had held possession of the note, or that the indorsements on the note were in his handwriting, and made during the lifetime of the testatrix. Each circumstance had a material bearing upon the issue, and each was important only because it was a transaction to which the decedent was a party. To the first, as acquiescing in the continued possession of the note and thereby permitting an implication of its validity, and to the other, as payor of the money referred to in the indorsement. Unless that money was paid by her, or the indorsement made with her implied assent, it was of no significance.

It was also error to allow the evidence of Catharine, the wife of the plaintiff. She was the daughter of the payee of the note, the plaintiff's testatrix, and, to the extent of one-third of the amount, entitled to share in the recovery. She was, therefore, a person interested in the event of the proceeding. The same remark applies to Mary Baylis. She was a daughter of the payee, a sister of the preceding witness, and personally interested in like manner. Except for the testimony of these three witnesses, the plaintiff and the two daughters of the testatrix, there would have been no evidence to suggest even a liability upon the note. No part of it was competent, and because of its admission and the other errors above referred to, the judgment of the court below should be reversed and a new trial granted, costs to abide the event.

All concur, except EARL, J., not voting.

Judgment reversed.

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ELIZABETH BYRNES, as Administratrix, etc., Respondent, v.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD
COMPANY, Appellant.

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117	639
113	251
121	219
113	251
131	545
132	572

S., plaintiff's intestate, was in defendant's employ as a brakeman upon a freight train. A car loaded with lumber at a way station was to be attached to the train. It was being moved by the engine from the switch to the main track. S. got upon it to stop it, but in consequence of the improper manner in which the car was loaded the brake was rendered useless, a collision occurred and S. was thrown from the car and killed. In an action to recover damages, it appeared that the car and its appliances before it was loaded was in good condition. It was, by defendant's rules, made the duty of the station-master to either inspect the car himself or have some one do so before it was taken out. Had this been done the improper loading would have been discovered. *Held*, that defendant, having provided a safe car and a system and competent men for its inspection, for injuries resulting to a co-employee, for their neglect of this duty, it was not liable.

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158	808

Also, *held*, the question was not affected by the fact that the car was loaded by the owner of the lumber.

Also, *held*, that the question was sufficiently raised by a motion for a non-suit based on the ground that no negligence of the defendant had been shown.

(Argued March 18, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 13, 1888, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

This action was brought by plaintiff, as the administratrix of Sylvester Byrnes, for the recovery of damages resulting from his death. Byrnes was a brakeman in the service of the defendant, and was engaged on a freight train which ran between Port Jervis and Deposit. On the 25th day of February, 1884, his train was going east and there was a car of lumber on a side track at Lordville to be taken into his train. When the train approached Lordville the engine was loosened from it while it was in motion and ran down with

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greater speed than the disconnected train to the vicinity of the lumber car. That car stood upon a switch on the west side of the track and was connected with the main track at one end only, being what is known as a blind switch. The open end of the switch was at the west towards the coming train. To start the car and run it to and upon the track one end of a bar of wood called a stake was placed at the rear end of the engine after it passed the lumber car, and the other end against the front or east end of the lumber car, and then the engine was started back and thus propelled the car along the switch and upon the main track. This is called staking out a car. By the time this car was thrown upon the main track at the mouth of the blind switch, the train still in motion had approached within about fifty feet of the car. Byrnes was then on the top of the train and near the front end, and after setting the brake there he went down from the train and ran to the lumber car then coming towards him, ascended the car while it was still in motion and reached the wheel of the brake and made some move to turn the wheel. At that instant the lumber car and the train came together with violence and shot the lumber back and Byrnes was caught between it and the car behind and received injuries from which he died in a few days.

The further material facts are stated in the opinion.

Lewis E. Carr for appellant. To sustain a verdict there must be something more than a mere scintilla of evidence, or than the existence of a condition of things equally consistent with negligence and its absence. (*Barleo v. R. R. Co.*, 59 N. Y. 356, 366; *Hayes v. R. R. Co.*, 97 id. 259, 262; *Dwight v. Insurance Co.*, 103 id. 341, 358, 359.) The real or proximate cause of the injury is alone to be considered. Unless the evidence points out the negligence of the defendant as the proximate cause the action fails. There is need of something more than a state of facts consistent with either hypothesis. (*Hayes v. R. R. Co.*, 97 N. Y. 259, 262; *Hofnagle v. R. R. Co.*, 55 id. 608; *Searles v. M. R. Co.*, 101 id. 661; *Taylor*

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v. *City of Yonkers*, 105 id. 202, 208, 209; *Kaveny v. City of Troy*, 108 id. 571, 577.) Where two or more causes seem to have co-operated in producing an injury that is proximate without which it could not have occurred, and that remote which may or may not have produced it. (*Ring v. City of Cohoes*, 77 N. Y. 83, 90; *Searles v. M. R. Co.*, 101 id. 661; *Taylor v. City of Yonkers*, 105 id. 202; *Harvey v. R. R. Co.*, 88 id. 481; *Williams v. R. R. Co.*, 39 Hun, 430, 434; *Sellick v. R. R. Co.*, 32 A. L. J. 448, 449; *Hall v. C., etc., R. R. Co.*, 49 Hun, 373, 375, 376; *Whittaker v. D. & H. C. Co.*, Id. 400, 403.) The jury must not be left to conjecture, and a bare possibility that the damage was caused in consequence of the negligence and unskillfulness of the defendant is not enough. (*Taylor v. City of Yonkers*, 105 N. Y. 202, 208; *Kaveny v. City of Troy*, 108 id. 571, 577; 101 id. 661.) If the servant, for his own accommodation, or in pursuance of his own method, sees fit to pursue a course which increases the danger, he may not say when the danger has overtaken him, he assumed the means provided by his employer would prove suitable for the emergency created by himself. The risk from such an act he takes upon himself. (*Haskin v. R. R. Co.*, 65 Barb. 129; *Murphy v. R. R. Co.*, 11 Daly, 125, 132; *Powers v. R. R. Co.*, 98 N. Y. 274, 280; *McGrath v. R. R. Co.*, 18 Am. and Eng. R. R. Cas. 5; 3 Wood's Railway Law, 1490; *Durgin v. Munson*, 9 Allen, 396; 85 Am. Dec. 770.) Where a brakeman seeks to board a moving train, the speed of which he misjudges, and receives injury because some of the equipments of the car or engine are defective, recovery is denied. (*Dowell v. R. R. Co.*, 18 Am. and Eng. R. R. Cas. 42; 28 id. 553; *Eckert v. R. R. Co.*, 43 N. Y. 502; *Roll v. R. R. Co.*, 15 Hun, 496, 502; 80 N. Y. 647; *Lockwood v. R. R. Co.*, 6 Am. and Eng. R. R. Cas. 151, 160, 161.) Certain duties devolve upon the employer, and to whomsoever those duties are intrusted, he for the time represents him, and his neglect is that of the employer. (*Crispin v. Babitt*, 81 N. Y. 516; *Neubauer v. R. R. Co.*, 101 id. 607.) Beyond that point, and in the use of the means provided comes the

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field of executive detail, in which liability does not attach to the employer for neglect. (*Rose v. R. R. Co.*, 58 N. Y. 217; *Slater v. Jewett*, 85 id. 61, 71, 72.) The immediate employer of the agent or servant, through whose negligence an injury occurs, is the one responsible for his negligence. (*Blake v. Feris*, 5 N. Y. 48; *Devlin v. Smith*, 89 id. 470, 476; 55 Am. Dec. 317.)

John W. Lyon for respondent. A railroad company owes to its employes the duty of providing and maintaining safe and suitable structures, cars, machinery and appliances, so as to protect them against danger and accidents. (*Bushby Case*, 107 N. Y. 374; *Lilly Case*, Id. 566; *Benzing v. Steinway*, 101 id. 547; *Stringham v. Stewart*, 100 id. 516; *Gottlieb v. Erie Co.*, 29 Hun, 637; 100 N. Y. 462; *Dekay v. Erie Co.*, 33 Hun, 665; 102 N. Y. 666; *Fuller v. Jewett*, 80 id. 46; *Ellis v. Erie Co.*, 95 id. 546; *Flike v. B. & A. R. R. Co.*, 53 id. 549; *Lanning v. N. Y. C. R. R. Co.*, 79 id. 521; *Connelly v. Pollion*, 41 Barb. 366; 41 N. Y. 619; *Plank v. N. Y. C. R. R. Co.*, 60 id. 607; *Mehan v. S. B. & N. Y. R. R. Co.*, 73 id. 585; *Booth v. B. & A. R. R. Co.*, id. 138, 210; *Cone v. D., L. & W. R. R. Co.*, 81 id. 206; *Besel v. N. Y. C. & H. R. R. Co.*, 70 id. 163; *Malone v. Hathaway*, 64 id. 5; *Pantzar v. T. F. M. Co.*, 99 id. 368; *Sheehan v. N. Y. C. & H. R. R. Co.*, 91 id. 332; *Painton v. N. C. R. Co.*, 83 id. 7; *Ryan v. Fowler*, 24 id. 414; *Corcoran v. Holbrook*, 59 id. 520; *Kirkpatrick v. N. Y. C. & H. R. R. Co.*, 79 id. 240; *Kane v. Smith*, 80 id. 458; *Muldooney v. I. C. R. Co.*, 36 Iowa, 462; *Fay v. M. & S. L. R. Co.*, 15 N. W. Rep. 241; *King v. O. & I. R. Co.*, 14 Fed. Rep. 277; *G. T. R. Co. v. Cummings*, 27 Alb. Law Jour. 294; *Hough v. Railway Co.*, 100 U. S. [10 Otto], 213.) The deceased had the right to understand and assume that the defendant had exercised care and diligence in providing a safe and useful brake, in perfect working order for the hazardous service he was required to perform at this blind switch, so as not to expose him to unreasonable risks and danger. (*Connelly v. Pollion*,

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41 Barb. 366, 369; 41 N. Y. 619; *Noyes v. Smith*, 28 Vt. 59; 24 N. Y. 414; *Jetter v. N. Y. & H. R. R. Co.*, 2 Abb. Ct. App. Dec. 458-461; *Ford v. F. R. R. Co.*, 110 Mass. 240; 14 Am. Rep. 605, 606; *Gibson v. P. R. R. Co.*, 2 id. 500; 46 Mo. 163; *F. W. & C. R. R. Co. v. Gildersleeve*, 33 Mich. 133; *T. & C. R. R. Co. v. Ingraham*, 77 Ill. 309.) It is not necessary to rely here upon circumstances. Affirmative proof of the most positive nature appears, and the conclusion of the jury that deceased was killed because of this defective brake, was proper and warranted, any other conclusion would have done violence to reason, as would any different conclusion by this court. (*Jones v. N. Y. C. R. R. Co.*, 28 Hun, 364; 92 N. Y. 628; *Taylor Case*, 105 id. 203; *Searles Case*, 101 id. 661; *Cahill Case*, 106 id. 512; *Lilly Case*, 107 id. 566.)

PECKHAM, J. We may assume that it was not only the duty of the defendant to furnish a proper car with safe appliances, in good repair, but that the defendant as master owed the further duty to the servant to provide a proper system and competent men for the inspection of cars after they were loaded and before they were to be used. The evidence in this case shows that the defendant had complied with this duty. It shows that it was the duty of the station-master at the station where the car was loaded, to either inspect the car himself or to have some of his men inspect it after it was loaded and before it was taken out. The defendant having fulfilled its duty as a master, by providing a system and competent servants for the inspection of cars, and having imposed the duty of such inspection upon the station agents and his servants, cannot be held responsible for the negligence of such servants. In carrying out such inspection the station agent was acting as an employe of defendant, and any neglect of his in regard to such inspection and by which an accident happened to any other servant, was the neglect of a co-employe, and not the neglect of the master. The evidence shows that the car before it was loaded was in perfect condition, with a brake in good order and entirely adequate for the purpose for which it was

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intended. By the negligence of the person who loaded the car, the lumber was placed against the brake rod, and also against the wheel at the top of the brake, so that it thereby became impossible to use the brake. This is the contention on the part of the plaintiff. The fact was contested by the defendant upon whose part evidence was given that the lumber was properly loaded and that the brake was in good order and that the accident occurred on account of the negligent manner in which the lumber car was "staked" out, while the train was approaching at such a speed. But for this purpose we must assume that the car was improperly loaded, and the brake rendered useless for that reason. It must also be assumed that if the station-master or his servant had done his duty and had inspected the car before it was "staked" out, the improper loading would have been discovered and measures taken which would have prevented the accident.

Nevertheless, we think the defendant had fulfilled its duty to the servants in its employ when it furnished a perfectly safe car and appliances, and when it also provided a system of inspection of cars, and proper persons to inspect them after they were loaded and before they were to be taken away. The failure to inspect, or, if inspection were made, the failure to rectify the improper loading by which the brake was rendered useless, was not the failure of the master to fulfill his duty to his servant, but it was the negligence of a co-servant in carrying out the orders of the master. The master is not an insurer that all his servants shall perform their duty, and he performs his duty to the servant in this regard in providing a system of inspection and intrusting its performance to competent hands. If, thereafter, such servants are guilty of negligence, the master is not responsible therefor to a co-servant.

We do not see that the question is in any way altered by the fact that the car was loaded by the servants of the owner of the lumber which was placed upon it. Whoever loaded it, the master had provided for an inspection of the car before it was to be taken away, and if the inspection were neglected, it was still the same neglect of a servant of the defendant to do

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that which he ought to have done, and such neglect was not that of the master in fulfilling any of the duties which he owed as master to his servants. It cannot, we think, be properly contended that the master fails to provide a car which is a safe and proper one, or that he fails to provide one with proper appliances, because through the negligent manner in which the car is loaded the appliance is, on that account only, made useless for the purpose for which it was intended. The fact still remains that the car was in good condition, the brake in proper repair, fit for the use it was placed there for. It was rendered useless, not from any defect in the brake itself, but only from the fact that the person who loaded the car had improperly and negligently performed his duty.

It may be conceded that it was the duty of defendant to provide rules for inspecting the car after it was loaded, and proper men to carry out such rules, but when it did so it did all that it could be required to do. To carry out its rules necessitated the employment of servants, and a negligent loading of a car which was subsequently negligently inspected, or not inspected at all, could not alter the fact that the master had supplied originally a perfect car, and that the fault was not in the character of the car or in its appliances, but simply in the negligent loading of it.

A question has arisen, however, in this case, whether the point was sufficiently raised on the trial.

At the end of the plaintiff's evidence, and again when all the evidence was in, the defendant moved for a nonsuit on the ground, among others, that there was no evidence of negligence on the part of the master, the employer of the deceased. It is argued that the real contest in the case was over the question of fact whether the car had been improperly or negligently loaded, and that the defendant's evidence had in truth been confined to an attempt to prove that the lumber had not been placed against the brake, and that it was entirely free, and that the accident had occurred because of the improper manner in which the car had been "staked" out,

and pushed at too rapid a rate towards the train which was itself moving towards the car. There was, unquestionably, a sharp issue made on that point during the trial. But there was also evidence, already referred to, which showed that the master had in reality performed all the duty resting upon it for the proper protection of its servants.

We think the ground of the motion for a nonsuit above-mentioned sufficiently raised the question of the failure of proof of any negligence of the master. The almost universal practice in the trial of actions of this nature is to move for a nonsuit on the ground that no negligence of the defendant has been shown. It is rare, indeed, that the defendant goes into details for the purpose of showing why he claims that no negligence has been shown or in what particular respect the plaintiff has failed in his proof. The plaintiff always claims that upon all the facts in the case the question of whether there was or was not negligence is one for the jury to answer and not for the court. The motion for a nonsuit on the ground that no negligence has been shown, is predicated also upon all the evidence in the case, and it is assumed for the purpose of the motion that the evidence upon the part of the plaintiff is true, and the claim is then made that upon such assumption no negligence has been shown, or no question is in the case proper for a jury to pass upon. The counsel for the defendant, in orally arguing his motion, frequently enlarges upon it and presents the case as he regards it, in detail, and claims as to each separate piece of evidence, and as to all combined, that no question has been made for the jury. These arguments are never incorporated in the case, but any argument that can legitimately be adduced from the ground taken, and which is a fair inference from the evidence, has always, as we think, been regarded as sufficiently raised under the general motion on the ground of a failure to show any negligence. The inference of negligence may be raised in such various ways, and from so many different facts, that an attempt to specify each argument that might be urged as a ground for the motion might be somewhat dangerous in

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its nature, on the theory that such a specification being made, no other argument, although it might clearly appear from the evidence, could be thereafter raised. It is the nature of such a motion, in such a case, that it should be broad; that it should assume all the evidence on the part of the plaintiff to be true, and that all fair inferences therefrom which would be favorable to the plaintiff should be indulged in, and still the claim is made that upon all such evidence and inferences, no negligence has been proved.

In this case the motion was on the ground that no negligence of the master was proved. What other way of raising this question could have been taken? How was it to be made more specific? The motion must have assumed the truth of the plaintiff's evidence, which, if believed, showed that the car had been negligently and improperly loaded. If the master were responsible for such negligence, then the defendant was responsible for the accident, unless it were contended that the accident did not happen from that cause, and if that were the contention the natural ground for the motion would have been, as it seems to us, that the negligence of the master did not cause the accident. This was evidently the view taken of the case by the counsel for the defendant, for he immediately proceeded to state that fact as a separate ground for his motion, for he said there was no evidence that it was in consequence of any defect in the brake that the decedent received the injury which caused his death. The statement that there was no negligence on the part of the master must, therefore, as it seems to us, have been plainly directed to the point that the master was not responsible for the negligent loading of the car by which the brake was rendered useless. If it did not mean that, we are at a loss to conceive what it did mean.

It is said, however, that when the motion to nonsuit was first made at the end of the plaintiff's evidence, there was no evidence in the case that the defendant had fulfilled its duty of providing for an inspection of the car previous to its being taken away, and that hence there was no basis for that ground of exemption; and, therefore, it must be presumed that the

motion was aimed at some other point, probably the one that the defendant was not responsible for the negligent loading of the car because it was loaded by the employes of the owner of the lumber and not by those of the defendant. But if that be true it is not an answer to the motion when it was subsequently renewed. It only shows that at the time when the motion was first made the defendant's counsel, while contending that the defendant was not responsible for the negligent loading of the car, could at that time only base his motion upon the untenable ground that it was not responsible because the car was not loaded by its employes, while after the evidence on the part of the defendant was given, by which it appeared that the defendant had fulfilled its duty to its employes by providing a system and competent men for the inspection of the car after it was loaded, a renewal of the motion on the same ground that there was no evidence of any negligence on its part could be supported by the additional facts proved on the part of the defendant. The ground was the same on each occasion, viz., that the defendant was not responsible for the negligent loading of the car, but when the motion was renewed at the end of all the evidence facts had, in the meantime been proved, which we think afforded good ground for granting it.

If there should be made any question on a retrial as to whether the company had, in fact, provided rules for an inspection of the cars and proper men to inspect them, after they were loaded and before they were taken away, such question would be proper to submit to the jury under correct instructions.

On the record, as it now stands, the plaintiff failed to show negligence on the part of the defendant in regard to the performance of its duties as master. The point discussed was sufficiently raised at the trial to be available here.

We think the judgment should be reversed and a new trial ordered, costs to abide event.

EARL, FINCH and GRAY, JJ., concur; RUGER, Ch. J., and ANDREWS and DANFORTH, JJ., dissent, the latter on the ground that when the car was furnished to the deceased it was as a

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loaded, not an empty car, and at that moment the movement of the brake was obstructed and, therefore, the car was imperfect and unfit for use, and for its unfitness defendant was liable; also, that the question was not so raised by the exception as to be intelligible to the opposite party or the trial judge.

Judgment reversed.

WILLIAM SCHOLLE, Respondent, v. JACOB SCHOLLE, J. ROMAINÉ BROWN, Purchaser, Appellant.

In proceedings to compel a purchaser at a partition sale to complete his purchase, it appeared that R. formerly owned an undivided seven-tenths of the land in question; he conveyed two-tenths, and thereafter executed a deed which purported to convey his remaining interest, and under this deed the parties claimed title to one-half. It appeared, however, that the intent was to convey but two-tenths. *Held*, that, as the deed was liable to be reformed as against all the parties, it was to be assumed that the reformation might occur, and, therefore, in this respect the title was defective.

The will of R., after giving certain specific legacies, gave to his executors his residuary estate in trust, with power to receive the rents and profits, sell and convey the property, invest both the rents and profits and proceeds of sale "and to divide and apply the same and income thereof" as directed, *i. e.*, to apply the income of two-sixths of "said residue and remainder" to the use of his wife for life, with remainder over to his children, and to apply the income of one-sixth to each of his four children during life, with remainder over to the issue of such child, and with authority to advance to each child a specified sum out of the principal if the executors should deem best. In the gift of the legacies the testator used the words "give and bequeath," in those of the residuary estate the words used were "devise and bequeath." *Held*, that the final and ultimate division did not require a conversion of the land into money, nor was such a conversion required as respects the intermediate income; that, therefore, the remaindermen took a vested interest in the lands; and that the interests of the grandchildren were not cut off by a foreclosure suit, to which they were not made parties.

Where only a power of sale is given to executors by a will, without explicit and imperative direction for its exercise, and the intention of the testator can be carried out although no conversion is adjudged, the land will pass as such and not be changed into personalty. In the absence of an express direction to sell one may not be implied unless the design

113	261
124	486
113	261
132	397
113	261
136	110
113	261
169	*518

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and purpose of the testator is unequivocal and the implication so strong as to leave no substantial doubt; and so, unless the exercise of the power is rendered necessary and essential by the scope of the will, the authority is simply discretionary and does not work a conversion.

When the mortgage which was foreclosed was assigned to S., the plaintiff in the foreclosure suit, R. guaranteed the payment of one-half thereof. After R.'s death S. presented a claim to his executrix, who alone qualified and acted, for one-half, which was disputed. S. then began the foreclosure; the executrix was made a defendant and answered. Pursuant to an arrangement between her and S. she withdrew her answer and executed a deed to S. of R.'s entire interest. S. in return withdrew his claim against the estate and on the foreclosure sale bid in the property for the full amount of the mortgage. *Held*, that the deed was not a good execution of the power of sale and was invalid, as there was no sale such as the will contemplated, but an appropriation of the land to pay a debt, chargeable primarily upon the personal property, without an order of the surrogate, or proof that the personalty was insufficient to pay debts; also, that the surrogate was powerless to appropriate the land to the payment of debts except in the statutory method.

Accordingly *held*, that the title proffered was defective and the purchaser was not bound to complete his purchase.

Reported below, 28 J. & S. 474.

(Argued March 19, 1889; decided April 16, 1889.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made January 14, 1889, which affirmed an order of Special Term releasing J. Romaine Brown, as assignee of B. P. Fairchild, purchaser, from his purchase at a sale pursuant to judgment in this action.

This was an action of partition.

An interlocutory judgment of partition and sale was entered in May, 1885. As to the premises now in question, the sale took place in December, 1886, under a supplemental decree of this court. Mr. Fairchild became the purchaser of the premises in question and paid ten per cent of the purchase-money; he assigned his bids to J. Romaine Brown, whereupon it was stipulated that Brown should be bound by the printed terms of sale.

Subsequently Mr. Brown, through his attorney, served upon the referee a notice declining to accept the title and stating several objections to its validity, which may be summarized as follows:

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1. That the deed from William H. Raynor and wife to Lewis J. Phillips, dated November 30, 1872, and recorded January 13, 1875, in Liber 1317 of Conveyances, page 102, is void for uncertainty by reason of its omission to specify the amount of interest conveyed, and that if it should be held to convey the whole of Raynor's interest, it was liable to be reformed at the instance of the grandchildren of said Raynor, as, while he owned an undivided five-tenths, the intent was to convey only two-tenths.

2. That the descendants of William H. Raynor, that is to say, his grandchildren, were not made parties to the foreclosure suit brought by Abraham Scholle, as plaintiff, against Benjamin A. Willis and others, as defendants.

3. That the executors of William H. Raynor's will, viz., William R. Stewart, John H. Morris and Jonathan Edgar, were not made parties to such foreclosure suit.

4. That the deed executed by Sarah E. Cornish (formerly Sarah E. Raynor), individually, and as sole acting executrix of and trustee under the will of William H. Raynor, deceased, as party of the first part, to Abraham Scholle, William Scholle and Jacob Scholle, parties of the second part, dated November 21, 1878, was void or voidable for want of consideration, and the further reason that there were creditors of William H. Raynor who might show themselves entitled to have it set aside.

The lots in question are claimed by the plaintiff to have been part of a large tract of land north of One Hundred and Twenty-fifth street, in the city of New York, owned and possessed by Charles Henry Hall from about the year 1825 to the time of his death in the year 1852. From the year last mentioned until the year 1872 nothing seems to have been done with the property. In 1872 Benjamin A. Willis formed a syndicate to buy it, and did acquire title to it from the parties having an interest in it. In substance, the arrangement was, that Abraham Scholle should advance \$58,500; that Willis should purchase the property and thereupon should transfer to William H. Raynor an equal undivided seven-tenths of the

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property, and that out of these William H. Raynor should convey to Abraham Scholle two-tenths, and to Lewis J. Phillips two-tenths. To secure the amount to be advanced by Abraham Scholle it was further agreed that Willis should execute and deliver to Phillips and Raynor a bond and mortgage securing the payment of \$58,500, and that said bond and mortgage should be assigned by Phillips and Raynor to Scholle.

The arrangement was carried out, and, in pursuance of it, the conveyances and the mortgage and the assignment thereof were made, except that William H. Raynor, instead of conveying to Lewis J. Phillips two-tenths, in terms, executed and delivered to the latter the deed to which the first objection above specified is made. The deed purported to convey *all* the undivided tenth parts which had been conveyed to Raynor by Willis, and described them as *seven* undivided tenth parts. In point of fact, Raynor, after having conveyed two-tenths to Abraham Scholle, had only five-tenths left which he could convey.

In 1873 Lewis J. Phillips mortgaged his interest in two-tenths to John D. Phillips. That mortgage was foreclosed, and the title for the interest covered by it transferred to Benjamin A. Willis by referee's deed. Abraham Scholle foreclosed the mortgage transferred to him by Phillips and Raynor, and the title to the property bound by that action became vested in Jacob Scholle by referee's deed dated April 1, 1880.

William H. Raynor died in 1874, leaving a will by which he appointed Sarah E., his wife, as executrix, and three other persons as executors. Of these Sarah E. alone qualified as executrix. The will, after providing for the payment of debts and funeral expenses, and after various specific legacies, contained the following clauses :

"Fifthly. I give, devise and bequeath all the rest, residue and remainder of my estate, real and personal, unto my executrix and executors hereinafter named, and the survivors and survivor of them in trust, with power to receive the rents and profits of the same and to sell, dispose of and convey the same at such time or times, and in such manner as to them shall

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seem proper and best for the interest of my estate, and to invest and keep invested such rents and profits and the proceeds of such sale or sales * * * and to divide and apply the same and the income thereof as hereinafter directed.

"*Sixthly*. I give and bequeath and I hereby authorize and direct my said executrix and executors to apply the income of two-sixths part of said residue and remainder of my estate semi-annually to the use of my said wife Sarah E., for and during the term of her natural life, and after her death I give, devise and bequeath the said two-sixths parts of said residue and remainder of my estate unto my children living at the time of her decease, and unto the lawful issue of any deceased child or children to be divided equally, share and share alike, *per stirpes* and not *per capita*, among such children and issue, the issue of any deceased child to have the share the parent would have been entitled to if living.

"*Seventhly*. I give and bequeath and I hereby authorize and direct my executrix and executors to apply the income of one-sixth part of said residue and remainder of my estate semi-annually to the use of my said son William H., for and during the term of his natural life, and after his death I give, devise and bequeath the said one-sixth part of said residue and remainder of my estate, or so much thereof as may remain unto the children of my said son living at the time of his decease, and to the lawful issue of any deceased child or children of my said son, to be divided equally, share and share alike, *per stirpes* and not *per capita*, among such children and issue, the issue of any deceased child to have the share the parent would have been entitled to if living. And I authorize my executrix and executors, in their absolute discretion, to advance and pay over to my said son the sum of twenty-five thousand dollars, or any less sum of the principal of said one-sixth part of the said residue and remainder of my estate when or at any time after my said son shall attain the age of twenty-five years, if they shall deem it best so to do."

By the three following clauses a similiar provision was made

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for each of the three other children of the testator, save as to the amount authorized to be advanced.

The eleventh clause was as follows :

“*Eleventhly.* If either of my said children shall die without leaving lawful issue surviving, then the portion of my estate which would have belonged to such issue I give, devise and bequeath unto my surviving children and unto the lawful issue of any deceased child or children, to be divided equally, share and share alike, *per stirpes* and not *per capita*, among such children and issue, the issue of any deceased child to have the share the parent would have been entitled to if living.”

On or about October 9, 1876, Sarah E. Raynor, as sole acting executrix of and trustee under the will of William H. Raynor, deceased, presented to the Surrogate's Court a petition for an accounting, and from the schedules filed by her in connection therewith it appeared that Abraham Scholle had presented a claim on his part against Raynor's estate for \$28,948.18, with interest from November 1, 1875. This claim was classified by the executrix among the uncertain and disputed claims. In point of fact, it was based, although the schedule did not show it, upon the written guarantee of Raynor that fifty per cent of the principal and interest of the bond and mortgage for \$58,500 should be paid, and that he would also pay one-half of the taxes and assessments. On or about February 8, 1877, Abraham Scholle commenced his action to foreclose the \$58,500 mortgage. In the meantime Sarah E. Raynor had married again, and her name then was Sarah E. Cornish. As such she interposed an answer to the complaint. Thereupon an agreement was made between Scholle and Mrs. Cornish that the former should withdraw his claim against the estate of Raynor and allow the estate to be settled up, and that in consideration therefor Mrs. Cornish should withdraw her answer and relinquish all interest she had in the mortgaged premises, individually and as executrix of and trustee under the will of Raynor. The agreement was carried out, and in pursuance thereof Mrs. Cornish executed

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and delivered to Abraham Scholle, William Scholle and Jacob Scholle the deed dated November 21, 1878. By that deed she conveyed the mortgaged premises and all the estate, right, title, interest, claim and demand whatsoever, both in law and equity, which William H. Raynor had in them in his lifetime and at the time of his decease and which she had in them by virtue of his will and testament or otherwise. Thereafter, on or about December 28, 1881, Mrs. Cornish presented to the surrogate a petition for a final accounting, and the accounts and schedules filed in connection therewith showed that the claim of Scholle had been settled.

Mrs. Raynor was made a party defendant to this execution. The executors named in Mr. Raynor's will were not made parties, nor were his grandchildren, some fourteen in number.

Alexander B. Johnson for appellant. A conversion being necessary to accomplish the general scheme of the testator, the power of sale operates as such and takes effect as of the date of the testator's death. (*Lent v. Howard*, 89 N. Y. 169-177; *Delafield v. Barlow*, 107 id. 535; *Phelps, Exr., v. Pond*, 23 id. 69; *Stagg v. Jackson*, 1 id. 206; *Hood v. Hood*, 85 id. 570; *Fisher v. Banta*, 66 id. 468; *Morse v. Morse*, 85 id. 53; *Lockman v. Reilly*, 95 id. 167.) If a person named in a will as executor, to whom there is a devise in trust, is *nolens volens* vested with an estate, that interest is cut off by the renunciation of the trust or death of the individual. A formal deed of disclaimer is not necessary. (*Burritt v. Silliman*, 13 N. Y. 93; 2 R. S. [Edm. 2d ed.] tit. 4, pt. 2, chap. 6, p. 113, § 55; *Leggett v. Hunter*, 19 N. Y. 445; *Taylor v. Morris*, 1 id. 343; *Mott v. Ackerman*, 92 id. 539, 553.) The burden of proof is upon the objector to show that there was sufficient personality to pay the debts. (*Mosher v. Cochrane*, 107 N. Y. 35; *Ferguson v. Crawford*, 70 id. 253.) The decree in the Surrogate's Court was final and conclusive as to all matters litigated and decided therein, or which might have been litigated in such proceeding. (Code, § 2743; *Clemens v. Clemens*, 37 N. Y. 59; *Embury v. Connor*, 3 id. 511-533; *Yates v. Preston*,

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41 id. 113; *Leavitt v. Wolcott*, 95 id. 212; *In re Tilden*, 98 id. 434; *In re Hawley*, 100 id. 206.) The recitals in the decree that all the infants were represented by guardians and that all the creditors were cited to appear is *prima facie* proof of those facts. (*Ferguson v. Crawford*, 70 N. Y. 253; *Dickerson v. Mayor, etc.*, 5 id. 434.) A surrogate's jurisdiction cannot be questioned collaterally. (*Martin v. Dry Dock Co.*, 92 N. Y. 70, 76.) An executor is authorized by law to compromise claims of the estate, and they have such power under the common law. (*Choteau v. Suydam*, 21 N. Y. 179, 184.)

Thomas Hooker and *J. Bleecker Miller* for respondent. The deed from Raynor to Phillips is, in fact, at the present time, and ever since its delivery, has been liable to reformation on the ground of mutual mistake. (*Moses v. Murgatroyd*, 1 Johns. Ch. 127.) The foreclosure of the \$58,500 mortgage did not bar or conclude the infant devisees of Raynor. The deed from Sarah E. Cornish, as executrix of Raynor, to Scholle, was not within the terms or spirit of the power of sale contained in Raynor's will, which gives power only "to sell, dispose of and convey," and "to invest and keep invested the proceeds of such sale or sales" and "to divide and apply the same" among various devisees. (*Hetzel v. Barber*, 69 N. Y. 13; *McPherson v. Smith*, 49 Hun, 254, 258; *Kinnier v. Rogers*, 42 N. Y. 531; Gerard on Titles [3d ed.] 448; *Delafield v. Brower*, 107 N. Y. 540; *Lockman v. Reilly*, 95 id. 64.) The direction in an earlier clause of the will to pay debts does not affect the question, as the creditors would have the priority even if no such direction had been inserted in the will. (*In re City of Rochester*, 110 N. Y. 164; *Hoyt v. Hoyt*, 17 Hun, 197.) Admitting that there is some implied power therein to sell in order to pay debts, yet that would not authorize a transfer to a creditor for no other real consideration than a release from his claim. (*Russell v. Russell*, 36 N. Y. 583, 584; *Goode v. Comfort*, 39 Mo. 313; *Hoyt v. Hoyt*, 17 Hun, 197; *McPherson v. Smith*, 49 id. 257; *In re Brewster*, N. Y. D. Reg., Dec. 17, 1888; *Hoyt v. Bennett*, 50 N. Y. 545, 546; Code of

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Civil Pro. § 2745 ; *Livingston v. Newkirk*, 3 Johns. Ch. 319 ; *Williams v. Eaton*, 3 Redf. 503 ; *Kinnier v. Rogers*, 42 N. Y. 534.) A sale or transfer by the trustee in order to pay or settle a claim against the estate would be void in any case, because in contravention of the trust. (*Briggs v. Davis*, 20 N. Y. 15.) The transfer by Raynor's executrix was not ratified or confirmed by the references thereto or attempt to include the same in said executrix's account, nor by the decree on such accounting in the Surrogate's Court. (*Roderigas v. E. R. Sav. Inst.*, 76 N. Y. 320 ; *In re Kellogg*, 39 Hun, 275 ; *Richardson v. Root*, 19 id. 473 ; Code of Civil Pro. §§ 2743, 2745 ; *Cooper v. Felter*, 6 Lans. 485 ; *Tucker v. Tucker*, 4 Keyes, 149 ; *Dye v. Karr*, 15 Barb. 444 ; *In re Kendrick*, 107 N. Y. 105, 111 ; *Bryan v. Cooper*, 72 id. 327 ; *Hopkins v. Van Volkenberg*, 16 Hun, 5 ; *Leveness v. Cassebeer*, 3 Redf. Sur. Rep. 492 ; *Scheu v. Lehnning*, 31 Hun, 183.) The questions arising herein are too serious to be entailed upon a purchaser, and courts are not in the habit of passing upon them in the absence of other parties interested. (*Jordan v. Poillon*, 77 N. Y. 521 ; *Fleming v. Burnham*, 100 id. 1 ; *McPherson v. Smith*, 49 Hun, 257.) The purchaser should not be held and compelled to wait until new parties can be brought in for the purpose of deciding these questions, but should be relieved from his purchase and reimbursed his deposit and expenses of examining title. (*Toole v. Toole*, N. Y. Daily Reg., Feb. 13, 1889.)

FINCH, J. Very convincing proof is furnished in this case that Raynor, at his death, owned an undivided three-tenths of the land in controversy notwithstanding his deed to Phillips, which, on its face, purported to convey his entire interest. That deed is liable to be reformed as against all the parties before us, and in judging the title proffered to the purchaser we must assume, in the interest of his safety, that such reformation may occur ; and proceed to the inquiry whether that undivided three-tenths passed under his will to the grandchildren in remainder, or was taken from them and

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their interest extinguished by the sale on foreclosure, or the deed given by the executrix.

The grandchildren were not made parties to the foreclosure of the mortgage given to Scholle; but the executrix, who alone qualified and entered upon the execution of the will, was made a party defendant. It is now claimed in behalf of the title tendered, that by the terms of Raynor's will there was an equitable conversion of the real estate into personal, and that the grandchildren took no interest in the land, but only legacies in money coming to them through the executrix, and so her presence as a party was alone needed to make the judgment of foreclosure pass a clear title to the land when executed by a sale.

There is in the will no imperative direction for the sale of the real estate. Indeed, there is no direction to sell at all. A power or authority to sell is given, but unless the exercise of that power is rendered necessary and essential by the scope of the will and its declared purposes, the authority is to be deemed discretionary, to be exercised or not, as the judgment of the executrix may dictate, and so an equitable conversion will not be decreed. (*White v. Howard*, 46 N. Y. 162.) To justify such a conversion there must be a positive direction to convert, which, though not expressed, may be implied; but, in the latter case, only when the design and purpose of the testator is unequivocal and the implication so strong as to leave no substantial doubt. (*Hobson v. Hale*, 95 N. Y. 598.) Where, however, only a power of sale is given without explicit and imperative direction for its exercise, and the intention of the testator in the disposition of his estate can be carried out, although no conversion is adjudged, the land will pass as such and not be changed into personalty. (*Chamberlain v. Taylor*, 105 N. Y. 194.)

We are, therefore, required to consider the terms of the will and the purposes which they indicate. The testator, after a formal direction for the payment of debts and funeral expenses, gives certain specific articles to his wife and to his children; and then, in the fifth clause of his will, gives, devises and

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bequeaths to his executors all the rest, residue and remainder of his estate in trust, with power, first, to receive the rents and profits; second, to sell and convey the property; third, to invest both rents and profits and proceeds of sales; and, fourth, "to divide and apply the same and the income thereof" as directed. By the words "the same," as used in the last clause, the testator obviously means the entire residue given in trust, for the same words were used in a preceding clause where they could have no other interpretation, and the division referred to, as shown by its carefully expressed terms, was of the whole estate, and not merely of some portion invested. The testator then directs his executors to apply the income of two-sixths of the residue and remainder to the use of his wife for life, and, upon her death, bequeaths and devises such two-sixths to his children then living, and the issue of those deceased. Then follow four clauses identical in construction and language, by which, as to each of his four children, he gives and bequeaths and directs his executors to apply one-sixth of the residue to such child for life, with remainder over to the issue of such child then living, or the children of such issue, if deceased. A final provision respects the death of a child without issue and carries that over to the survivors and the issue of those deceased. There is thus contemplated beyond the life estate of the widow an equal division of the whole residue among the children for life, with a remainder over to the grandchildren. The final and ultimate division in no sense or respect requires or compels a conversion of the land into money, and each devise and bequest is of an aliquot part of the residue, and not of the proceeds of such residue when turned into money. A conversion would, perhaps, be convenient as an aid to the ultimate distribution, but is not rendered necessary or essential to the final division. Nor, as it respects the intermediate income, is any such conversion requisite. The executors are to receive the rents and profits, and are authorized to invest the same, together with any proceeds of sales which, in the exercise of their discretion, they may have made, but the income of the whole residue is given, and not merely of the invested funds; and

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while the executors are apparently empowered to turn rents and profits into capital by investing the same, they are not required to do so by any implied direction, and if they were, it would only indicate the testator's expectation that land, as the origin of rents and profits, would remain in the hands of the executors until, by possibility, the date of final division. It is observable that the language of the testator is very carefully employed to rebut the theory of a conversion. In each of five articles, when giving income merely, he uses the phrase "I give and bequeath," appropriate to a mere gift of personal property, but when he creates the remainders, the language changes uniformly and in every instance and becomes "I give, *devise* and bequeath." The change of phraseology seems not to be accidental, but intentional, and to indicate the testator's expectation that land, as such, would pass in the remainders, and their gift require the added word "*devise*."

Our attention is drawn to an adverse conclusion of the Supreme Court in another case not reported involving, by way of specific performance, the same title here in question. (*Mut. Life Ins. Co. v. Wood*, 51 Hun, 640.) We have given the opinion in that case a careful consideration. Its argument for a conversion is founded upon the idea that rents and profits are never to be divided *as such*, but to pass as capital into a fund the income of which is to be divided, and then the fund itself. If we concede that the power given to invest rents and profits makes such investment in all cases obligatory, which is a point open to question, it does not follow that the land was not given, subject to an appropriation during lives of the rents and profits, to a fund the income of which was otherwise appropriated. I am inclined to think, however, that the investment of rents and profits referred to by the testator had relation only to such parcels or portions of the land as the executors, in the exercise of their discretion, might see fit to sell, for in the ultimate division the testator gives, not aliquot parts of the invested funds or proceeds of sales, but of the very rest, residue and remainder which he gave to his executors in trust, and by a form of language alone appropriate to the transfer of land as

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land. We are unable to discover in the scope or plan of the testamentary disposition any such necessity for an equitable conversion as would justify an implication of a positive direction.

In the situation of the estate of Raynor, as it stood when his will was executed, there was much to occasion and explain a discretionary power of sale in his executors but nothing to justify an imperative command. The bulk of his property consisted of real estate which he and his associates had purchased in the upper part of New York, and extending from One Hundred and Thirty-eighth to One Hundred and Forty-second streets, in numerous lots. The purchase was doubtless made by the testator and his associates with an expectation of large increase of values as the growth of the city extended. Raynor's property was heavily mortgaged and he must have looked to great profits in his enterprise and contemplated a growth of value in the future which would not only pay off the incumbrances, but furnish a basis for the large advances which he authorized his executors to make to his children. But the future was uncertain. The expected increase might come swiftly or be very slow in its approach. And so he made the advances rest in the *absolute* discretion of his executors. They were not to be compelled to sell for the purpose of making them, and were to be governed in their action by what appeared to be for the best interest of the estate and its beneficiaries. To command a sale might be to compel a sacrifice, but a discretionary power met the exigencies of the situation, and such was explicitly given. We ought not to broaden and strengthen it by a needless implication into an imperative command.

But the appellants claim that Raynor's three-tenths, if not cut off by the foreclosure, passed from the *remaindermen* by force of the deed of the executrix to Scholle as a due execution of the power of sale. The facts disclosed were as follows: When the mortgage for \$58,500 was assigned to Scholle, Raynor guaranteed its payment to the extent of

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fifty per cent. After Raynor's death, Scholle presented a claim to his executrix for one-half of the mortgage and interest, which the executrix disputed. Therafter Scholle began his action of foreclosure in which the executrix appeared and answered. The result was an arrangement by which the executrix withdrew her answer and executed a deed to Scholle of the entire Raynor interest, and he in return withdrew his claim against the estate or for any deficiency, and on the sale bid in the property for the full amount of the mortgage and interest. The substance of the transaction was a release of the guaranty in consideration of the conveyance to Scholle of Raynor's whole interest. In her settlement before the surrogate Scholle's claim appears first as not admitted, and afterward as settled by the deed of the executrix.

The power of sale given by the will was to sell at times or in a manner which the executors should deem for the best interests of the estate. The authority contemplated first a sale, and second the exercise of a judgment as to the best interest of the estate. Here there was, in truth, no sale such as the will contemplated. That was one for the purpose of realizing proceeds to be invested as the source of income and interest, and at a time when such values could be realized as would justify a sale instead of further delay for an appreciation of value. Nothing of that kind took place. No proceeds were realized. The land was appropriated to pay a debt chargeable primarily upon the personal property without an order of the surrogate or proof that the personal assets were insufficient to pay the debts. The authority to sell was given for one distinct and definite purpose, and not at all to enable a disputed debt to be compromised. The deed, therefore, passed no interest of the remaindermen, and the surrogate was powerless to take it away and appropriate it to the payment of debts except in the statutory method. (*Allen v. De Witt*, 3 N. Y. 276; *Briggs v. Davis*, 20 id. 15; *Roome v. Philips*, 27 id. 357; *Russell v. Russell*, 36 id. 581.) Whatever may have been the effect of the deed as against the interest of Mrs.

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Raynor, it was not a good execution of the power of sale as against the grandchildren, and did not divest them of their estate.

It follows that the title proffered was defective, and the purchaser was properly discharged. The questions involved were pure questions of law, unaffected by any possible change of the facts out of which they sprang, so far as the will and the deed of the executrix are concerned, and are not so doubtful or so evenly poised as to justify an omission to decide them.

The order appealed from should be affirmed, with costs.

All concur.

Order affirmed.

118	275
154	494

In the Matter of the Petition of the UNION ELEVATED RAILROAD COMPANY OF BROOKLYN to Acquire Title to Lands.

Where a railroad corporation organized under the "Rapid Transit Act" (Chap. 606, Laws of 1875), is authorized by its charter to construct distinct lines of railway "with the usual and necessary * * * curves, switches," etc., on two streets intersecting each other, it is within the scope of the powers conferred upon the company by the act and its charter to acquire title to, and it may take, by proceedings *in invitum*, lands necessary to effect a junction between the two routes, so as to enable the trains upon one to run upon the other.

The provision of said act (§ 26), which permits the junction of two railroads, comprehends the power to take real estate necessary to effect the connection, and it is not material that the two roads are operated by the same corporation.

While, unless the proposed taking of lands by the law of eminent domain is justified by a purpose or end, permitted or clearly contemplated by the franchise conferred upon a railroad corporation by its charter or the general law, the courts should refuse their aid, the powers of the corporation must be deemed to extend to the accomplishment of legitimate corporate acts, and to whatever may be within the scope of the legislative grant.

It is for the Supreme Court to investigate the facts upon which the corporation claims the right to take private property against the owner's will, and thereupon to decide whether a sufficient ground exists.

It seems, if the corporate charter authorizes the proposed taking and the action of the corporation appears to be free from any imputation of unworthy or dishonest motives, the court may not interfere with the

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exercise of the power; the only limit to its exercise is the reasonable necessity of the corporation in the discharge of its duty to the public. Where the Supreme Court has granted such an application, and the power to take lands for the corporate purposes is found clearly to exist in the charter and general law, and the purpose stated is one within the contemplation of the legislative act, this court will not interfere with the conclusions of the Supreme Court as to the necessity for taking the land, if reached after due proceedings as prescribed; its review will be confined to those questions which relate to the validity and legality of the proceedings.

(Argued March 19, 1889; decided April 16, 1889.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made January 15, 1889, which affirmed an order of Special Term appointing commissioners to appraise lands sought to be acquired by petitioner in proceedings for their condemnation under the Rapid Transit Act.

The facts, so far as material, are stated in the opinion.

Jesse Johnson for appellants. In construing grants to exercise the right of eminent domain, "a strict rather than a liberal construction is the rule." (*In re Poughkeepsie Bridge Co.*, 108 N. Y. 483, 490; *In re N. Y. Cable Co.*, 109 id. 32.) The rapid transit act makes the fixing of the routes an integral and separate step in the formation of a company, allowing for that, and that alone, thirty days. (Laws of 1876, chap. 606, §§ 4, 5.) The fact that the curves necessary to connect other routes are expressly provided by the charter negatives the possibility of providing curves for the Hudson avenue route by implication or construction. (*Flanagan v. Hollingsworth*, 2 How. [U. S.] 391; 108 N. Y. 621; *Hickes v. Taffe*, 99 id. 208; *Potter's Dwarries on Statutes*, 220.) The statute imperatively commands the commissioners to locate the route of the proposed railroad; a failure to do so, fully, fairly and with reasonable certainty and exactness, is a failure fatal to the life of the corporation. (*In re N. Y. Cable Co.*, 104 N. Y. 32; *In re Poughkeepsie Bridge Co.*, 108 id. 492.)

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George W. Wingate for respondent. If lands are required for the proper enjoyment and exercise of the franchise conferred, and in the performance of the service to the public assumed by it, they may be taken *in invitum*. The only limit to the power is the reasonable necessity of the corporation in discharging its duty to the public. (*N. Y. & H. R. R. Co. v. Kip*, 46 N. Y. 546, 552, 553; *In re N. Y. C. & H. R. R. Co.*, 77 N. Y. 248, 263.) The power of companies formed under the Rapid Transit Act (Chap. 606 of the Laws of 1875), is not restricted to the details enumerated by the commissioners in respect to the construction of the road or its appurtenances. (*In re N. Y. C. R. R. Co.*, 67 Barb. 426, 429; *S. C.*, 77 N. Y. 248; *N. Y. & H. R. R. Co. v. Kip*, 46 id. 546, 552; *In re S. I. R. T. Co.*, 103 id. 251, 257, 258, 260; *People v. N. Y. C. & H. R. R. Co.*, 74 id. 305.) The Union had authority to connect the two roads outside its charter. (Laws of 1880, chap. 583, § 12; Laws of 1875, chaps. 606, 748.) The company had a discretion to build its road as it deems its proper operation requires, and that discretion having been exercised in good faith will not be reviewed upon the application of a property owner. (*In re N. Y. C. R. R. Co.*, 77 N. Y. 248.)

GRAY, J. This proceeding was instituted to acquire certain real estate, alleged to be needed by the petitioner for the purposes of the operation of its railroad. It was opposed on various grounds; the only one of which we shall consider being the defendant's objection that the petitioner has no need for the land, within the purposes of its charter; and has no right to take it *in invitum*, within the powers conferred by its charter, or by the provisions of chapter 606 of the Laws of 1875, commonly known as the Rapid Transit Act.

It was adjudged by the Supreme Court, at Special Term, that the petitioner requires the real estate in question, in order to build two tracks on a curve over it, "for the purpose of connecting its railroad on Hudson avenue with its railroad on Myrtle avenue, for the purpose of operating the portions of

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such railroads, so to be connected together, by running trains over and from one such railroad on to the other and operating trains over such railroads and such tracks, across said property, as over a continuous road, and for a depot and stairs to be used in connection with such curve." It was also adjudged that the petitioner needs the property in question "for those purposes, for the purpose of its incorporation." The court, upon the trial, also found that the acquisition of the land was "dictated by the desire to make the junction between the two roads;" and that "for the junction of these two roads" the petitioner "requires this land, so it can run trains from one to another." The sole question for us to consider, therefore, is, whether lands can be condemned for railway purposes, under the provisions of the act, where the purpose avowed, or proved, is to effect a junction between two routes located by the commissioners and operated by the same company. The appellant insists that the right cannot be derived from the act or the charter; and that to concede its existence is, in effect, to allow the petitioner to make a new route, which was not laid down and is not necessary for either railroad. He argues that the act does not, in any event, apply to a connection between railroads belonging to a single corporation. The petitioner was organized under the Rapid Transit Act, and among the routes, upon which it was authorized to construct and operate an elevated railroad, were one upon Myrtle avenue and one upon Hudson avenue, in the city of Brooklyn. It has obtained the consent of the local authorities, and has, by due and appropriate legal proceedings, obtained the order of the General Term of the Supreme Court; required to be had in lieu of the consents of non-assenting property owners. The two routes cross each other at the junction of the two avenues named, and are distinct lines of railway.

An obvious, if not a conceded, purpose of making the connection between them by this proposed curve is to enable Hudson avenue trains to run upon the Myrtle avenue route, and thus to connect the two lines and both with the New York and

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Brooklyn bridge. With the ultimate and real purpose the court need not concern itself, provided it be one which is not forbidden by law and is one which, within the spirit and letter of the act and charter, conduces to a better operation of the railroad and to the public weal. We have repeatedly held in such proceedings, where the law of eminent domain is appealed to by a corporation, in its endeavor to acquire lands for railroad purposes, *in invitum* the owner, that a strict, rather than a liberal, construction will be given to the chartered powers. Such a rule of construction, manifestly, is the proper one always to be followed, where the property of a citizen is sought to be taken against his consent. The right to take it can be derived only from the state by legislative grant. It does not exist otherwise, and because in derogation of the ordinary rights of private ownership of property, the grant of power will be construed most strictly against the grantee. Although the petitioner was organized for a *quasi* public purpose, its organization was, of course, due to motives of individual interest and gain, and the courts would fail in their duty, if they did not scrutinize closely every corporate act, which invades the private rights of a citizen, and which is sought to be sustained or defended upon the theory of the delegation to the corporation of the right of eminent domain. Much has been said upon this subject of the exercise of the right of eminent domain by private corporations, and it is not necessary to dwell upon it here at any length. The right resides in the state at any time to resume the possession of private property for public use, upon just compensation being made. What it can thus do directly, it may, in the furtherance of a public purpose, delegate the right to do to a corporation, which has been created to subserve some supposed public convenience or necessity, and thus becomes invested with a *quasi* public character. Unless the proposed taking of lands by the law of eminent domain is justified by a purpose, or an end, permitted or clearly contemplated by the powers and franchises conferred upon a corporation by its charter, or the general law, the courts should refuse their aid. The powers of the corporation must be deemed

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to extend, however, to the accomplishment of legitimate corporate ends, and to whatever may be found to be within the scope of the legislative grant. The purpose, in creating a railroad corporation, must be deemed to be of a public nature, and the public is interested in its full and fair accomplishment. If a proposed corporate act is in furtherance of the public convenience, and can fairly find a sanction in the charter, it should be upheld. Individual interests must be subservient so far to the public, as to give way before an evident public requirement.

A railroad corporation, though private in the sense that it is managed and operated by private individuals, has that much of a public character, that it is necessary to consider it as an engine capable of the promotion of the public welfare and convenience, as it may be of public injury. It is made subject to the reserved right of supervision by the legislature; who may, where the public good is menaced, suspend the corporate life and control corporate action; within constitutional limitations as to the sanctity of property and contract rights. The power, which it has delegated to the corporation, to exercise the right to retake, upon making just compensation, private property for corporate purposes, in the nature of things, rests in the discretion of the board of directors. When sought to be exercised, the law has required the approval of the Supreme Court to be given, with proper guarantees of a hearing to the parties to be affected. It is for the Supreme Court to investigate the facts, upon which the corporation claims the right to take private property against its owner's will, and, thereupon, to decide whether sufficient cause exists. If the charter seems to authorize the proposed taking, and the action of the directors seems to be free from the influence of unworthy or dishonest motives, I do not see why the courts should interfere with the exercise of their discretion. Granted the power, and no suspicions of the honesty of corporate intentions being maintainable upon the proofs, the court cannot interfere with the exercise of the power. The only limit to its exercise would seem to be

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the reasonable necessity of the corporation, in the discharge of its duty to the public.

So it has been held by the courts, in cases where land is sought to be acquired *in invitum* by railroad corporations, organized under the general railroad acts, and the reasoning in such cases is applicable to cases arising under the Rapid Transit act.

In *New York & Harlem Railroad Company v. Kip* (46 N. Y. 547), ALLEN, J., delivering the opinion of the court, thus expressed himself: "The public have an interest in the use of a railroad, and in the proper performance of every power within the franchise conferred upon a railroad corporation, and hence every facility needed by such corporation is for public purposes, and whatever is required to enable the corporation to perform its duty to the public is within the principle which permits a delegation of power to it."

The Rapid Transit Act, under which the present railroad company was organized, was passed as a public measure and to supply a supposed existing need in the counties of the state for steam railways, for the transportation of passengers, mails or freight. So much is indicated from the title and opening section of the act. Every corporation formed under it has the right to acquire and hold such real estate "as may be necessary to enable it to construct, maintain and operate its railway or railways," and where it cannot agree with the owner, it may institute the condemnation proceedings which are prescribed in the act. It is there provided that the first move in the proceedings shall be to bring the matter before the Supreme Court, in the particular judicial district, upon the petition of the company, with proof of service of a copy of it upon the parties to be affected. They are thus given the opportunity of showing cause against the granting of the petition and of disproving the statements and allegations of the petitioner. The court must hear all the proofs and allegations, and, if no sufficient cause is shown against granting the petition, the court is required to appoint commissioners to appraise the compen-

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sation to be paid. Where the party affected by the proceedings, and who deems himself aggrieved by the granting of the application, comes, by the way of appeal, to this court, I think that our review of the proceedings below should be confined to those questions, which relate to their validity and legality. Where the Supreme Court has granted such an application and we find the power to take lands for the corporate purposes clearly to exist in the charter and general law, and that the purpose stated is one within the contemplation of the legislative act, I do not think we should interfere with the conclusions of the Supreme Court, if reached after due proceedings, as prescribed. There seems to be an obvious propriety in confining our review to the questions of law, which may arise, and in our not interfering with the determination of the Supreme Court as to the needs of the company for the land.

I see no legal ground upon which this appeal can be sustained. We have the adjudication of fact in the court below before us, to which I have heretofore referred; and reference to the charter and to the Rapid Transit Act fails to reveal anything in their provisions, which might be considered such a limitation upon their scope as to stamp the purpose avowed here as illegal. By section 26 of the act, every corporation formed under it is empowered "to cross, intersect, join and unite its railroad with any other railroad before constructed, at any point on its route; * * * with the necessary turn-outs, sidings and switches, and other conveniences in furtherance of the objects of its connections." With such a general authorization, can we say that it does not apply to a connection between two independent routes of the same corporation? I think, clearly, such a construction would be unreasonable.

Turning to the charter itself, I think, by language more or less direct, authority is given to construct curves to form connections between lines of railway tracks; whether the purpose be simply for constructing continuous and connected lines of railway, or whether it be simply for the convenience of the traveling public. The commission, in laying out the

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routes, had in view a provision for a general system of railroad routes and located ten separate routes in Brooklyn, which intersected each other at various points. The petitioner's articles of association embodied the resolutions of the commission, which accompanied their location of rapid transit routes. One of these resolutions provides that the location of the routes designated includes "the right to construct, use and operate in connection therewith the usual and necessary * * * curves, switches and platforms and other appurtenances incidental to the * * * operation and maintenance of elevated railroads."

By the forty-ninth clause of the general plan, or specifications, decided upon by the commission and forming part of the articles, "authority is given for the construction of such turn-outs, switches, supports, sidings, necessary third track, connections, landing-places, stations, buildings, platforms, stairways, etc., together with all other necessary requisites as will conduce to the comfort, safety and convenience of the traveling public."

With such provisions, intended to operate upon all corporations organized by the commission under the Rapid Transit act, where is there to be found any limitation upon the power of a company to connect its line of tracks with another distinct line, whether operated by itself, or by another company; if such a connection is found to conduce to the public welfare or convenience, or, simply, to the more effectual maintenance and operation of the railroad? The power given by section 17 of the Rapid Transit Act to a corporation to acquire, *in invitum*, such real estate as may be necessary to enable it "to operate its railway or railways," involves the idea of a possible ownership by it of more than one line of railway, and that section, and the twenty-sixth section, which permits the junction of two railroads, comprehend a power to take such real estate as may be required to effect the connection between them.

The connection being desired, and the application to condemn lands for the purpose of making it, after a due hearing of the parties by the Supreme Court, being found to be war-

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ranted, I think the individual interests must yield to the corporate requirements, in the furtherance of the public interests, as well as in pursuance of the legislative grant. In the *Kip Case* (46 N. Y. at p. 542), Judge ALLEN said, in considering the provisions of the general railroad act, as amended in 1869, which authorize a railroad company to take any real estate which it may require "for the purposes of its incorporation, or for the purpose of running or operating its road:" "The language of the act is very general and comprehensive. If lands are required for any of the purposes of the incorporation, or for the purpose of operating and running the road, that is in the proper enjoyment and exercise of the franchise conferred, and in the performance of the service to the public assumed by it, they may be taken *in invitum*." Such language is appropriate in the present case.

I have carefully considered all the points in the brief of the appellant's counsel, but none convince me that we can, or should, interfere with the determination of the Supreme Court, which, at Special and at General Terms, has approved of the petitioner's application.

The order should be affirmed, with costs.

All concur.

Order affirmed.

113	284
116	37
113	284
120	314
113	284
123	28
113	284
132	84

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF
NEW YORK, Respondent, *v.* DAVID C. CARLETON, Appellant.

SAME, Respondent, *v.* SAME, Appellant.

In an action of ejectment these facts appeared: Pursuant to an application on behalf of plaintiff an act was passed in 1839 (Chap. 246, Laws of 1839), authorizing it to acquire title by condemnation proceedings to land of which that in question is a part. Commissioners of estimate and assessment, purporting to have been appointed in proceedings under the act, made reports therein which were confirmed by the Supreme Court. The city paid the amounts awarded to the owners and immediately took possession of the lands. Pursuant to resolution of the common council a market was erected thereon. In 1842 that body, by resolution, directed a sale of all the other buildings on the land except the market-house.

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In 1843 a substantial fence was built by the city, inclosing all the land, and thereafter, for about twenty years, it leased the market-house. It also, in 1847 and 1849, erected engine-houses on the land. The land remained so inclosed and occupied until about 1860, when, pursuant to resolutions of the common council, the buildings were removed, and in 1863 it was thrown open to the public as a park, and was so used down to 1866 or 1867, during all of which time there was a substantial fence around it. In 1867 the land was put up for sale in lots at auction by the commissioners of the sinking fund. The purchasers of some of the lots took title and erected buildings thereon, other purchasers refused to take title and litigations resulted; the lots bid off by them, for five or six years thereafter, were neglected, the fences decayed and the lots were left open to intruders. Defendant and others went into possession of the premises in question in 1873 as mere intruders; he took several deeds from the others; the possession of none of them antedated 1873. In 1871 a committee of the commissioners of the sinking fund, charged with the duty of estimating the value of the real estate belonging to the city, included said premises in their report. This action was commenced in 1878. *Held*, that, without regard to the validity of the condemnation proceedings, as against defendant the city's prior possession authorized a recovery; that there was no such abandonment by it as lost to it the benefit of such prior possession; also, that it had acquired title by adverse possession.

Possession of land, *animo dominendi*, is *prima facie* evidence of title, sufficient as against all persons who cannot show a prior possession or a better title.

The benefit of such a possession is not lost to the possessor if he leaves the land temporarily vacant, *animo revertendi*.

A city, as well as an individual, may obtain title by adverse possession.

(Argued March 20, 1889; decided April 16, 1889.)

APPEALS from judgments of the General Term of the Superior Court of the city of New York, entered upon orders made December 15, 1886, which affirmed judgments in favor of plaintiff, entered upon verdicts directed by the trial court.

The nature of the action and the material facts are stated in the opinion.

D. P. Hays for appellant. In ejectment the plaintiff must recover on the strength of his own title, and if he has none, the question of the defendant's title is unimportant. (*Sweet v. B., N. Y. & P. R. Co.*, 79 N. Y. 297; *Hills v. Draper*,

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10 Barb. 458.) If the city has title to its streets, ancient or modern, it is only a title in trust to hold the ground and keep it open as streets for the use of the public. (*People v. Kerr*, 27 N. Y. 188, 197; *Matter of Gilbert El. R. Co.*, 38 Hun, 437, 448, 452, 453; *Bartow v. Draper*, 5 Duer, 154; *Lahr v. Met. El. R. Co.*, 104 N. Y. 289, 290, 291.) As to the condemnation proceedings, they were, if they were anything, special statutory proceedings to take private property from its owners *in invitum* by an exercise of the right of eminent domain; and to acquire title thereby, the plaintiffs were bound to prove that the requirements and prescriptions of the statute were strictly pursued. (*Dyckman v. City of N. Y.*, 5 N. Y. 439, 440; *Lewis on Eminent Domain*, § 253; *Atkins v. Kinnan*, 20 Wend. 249; *Sharp v. Speir*, 4 Hill, 76, 88; *Merritt v. Village of Portchester*, 71 N. Y. 312; *In re City of Buffalo*, 78 id. 366; *Cleveland v. Boerum*, 27 Barb. 252, 254; 24 N. Y. 613; *Adams v. S. & W. R. R. Co.*, 10 id. 330; *Striker v. Kelly*, 2 Denio, 330; *Stewart v. Wallis*, 30 Barb. 348; 1 Greenleaf on Evidence, § 500.) When courts of general jurisdiction act in the exercise of special statutory powers, their proceedings stand on the same footing as those of courts of limited and inferior jurisdiction. (3 N. Y. 511; *Ferguson v. Crawford*, 70 id. 259, 260; *Embury v. Connor*, 3 id. 523.) In special statutory proceedings the record is the primary evidence and is *prima facie*, but not conclusive, evidence of the jurisdictional facts recited in it. (Abbott's Trial Ev. 546, 701, 702, 714; *Bolton v. Jacks*, 6 Robt. 198; *Ferguson v. Crawford*, 70 N. Y. 267; *People ex rel. Frey v. Warden*, 100 id. 25, 26; *Harper v. Rowe*, 7 Rep. 174; 1 Greenl. on Evidence, § 511; *Matter of Arnold*, 60 N. Y. 26, 28; *Dolan v. Mayor, etc.*, 62 id. 472; *Embury v. Connor*, 3 id. 511, 522, 523.) The plaintiff should not rely upon presumptions where it was his duty to produce proof. (*Jackson v. Rice*, 3 Wend. 180-184.) Presumption does not supply the lack of proof. (*People v. Gates*, 56 N. Y. 386.) The act (chap. 246 of the Laws of 1839) which authorized the respondent to acquire title to a portion of the premises in question, was unconstitu-

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tional, as it provided for the taking of property for other than a public use. (Const. 1821, art. 7, § 7; Lewis on Eminent Domain, § 157; Cooley on Const. Lim. *530; *Coster v. Tide Water Works*, 18 N. J. Eq. 63; *In re Peter Townsend*, 39 N. Y. 174; 2 Kent's Com. 340, note c [5th ed.]; *Embury v. Connor*, 3 N. Y. 517; *In re Albany Street*, 11 Wend. 148, 151; *Bloodgood v. M. & H. R. R. Co.*, 18 id. 59; *In re Cooper*, 28 Hun, 524.) The plaintiffs did not acquire title to the premises by adverse possession. (Code Civ. Pro. § 370.) The city having taken the property for public use could not originate or continue an adverse possession in any other way than by devoting the property to a public use. (*Brooklyn Park Comrs. v. Armstrong*, 45 N. Y. 243; *People v. Kerr*, 27 id. 192, 197.) The taking of the case from the jury, and directing a verdict, by the court, was fatally erroneous. (*Waldron v. Tuttle*, 3 N. H. 340; 4 id. 71; *Hill v. Draper*, 10 Barb. 469; *Trustees v. Kirk*, 68 N. Y. 465-467; *People v. Gates*, 56 id. 387; *Whitney v. Wright*, 15 Wend. 177, 178.) If improper evidence is admitted under an objection and exception, the judgment must be reversed, if, by any possibility, the party may have been injured thereby. (*Brague v. Lord*, 67 N. Y. 499; *Baird v. Daly*, 68 id. 449-451; *N. Y. G. & I. Co. v. Gleason*, 78 id. 517; *Foot v. Beecher*, Id. 157; *Anderson v. R., W. & O. R. R. Co.*, 54 id. 343.) The plaintiff was estopped from bringing and maintaining these actions. As the defendant was in possession, the plaintiff was bound to make out a good legal title. If it failed to do so, the question of the defendant's title became unimportant. (*Sweet v. B., N. Y. & P. R. Co.*, 79 N. Y. 297.)

William L. Turner for respondent. Whatever *prima facie* right the appellant's possession may have made out was amply met and overcome by the evidence of the respondent's prior possession during the whole of the period indicated. (*Smith v. Lorillard*, 10 Johns. 356.) The city acquired absolute title to the property in fee by the proceedings taken under chapter 246 of the Laws of 1839. (*Dunham v. Williams*, 37 N. Y.

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251; *People ex rel. Murphy v. Kelly*, 76 id. 475-489; *Embury v. Connor*, 3 id. 518, 521.) The regularity of the proceedings was sufficiently proven. (Code of Civ. Pro. § 921; *Teale v. Van Wyck*, 10 Barb. 377; *King v. Stowbridge*, 8 B. & C. 96; *Dolan v. Mayor, etc.*, 62 N. Y. 472; *Embury v. Connor*, 3 id. 511; *Sherman v. Kane*, 86 id. 57-65.) Adverse possession by the city was established by uncontradicted and incontrovertible evidence, to which no exception was or could have been taken. (*City Bank of Brooklyn v. Dearborn*, 20 N. Y. 246; *Starbird v. Burrow*, 43 id. 200; *Heine v. Mayor, etc.*, 61 id. 171.) The building department has nothing to do with the title to property, but only with the manner of its improvement. No recognition by it of Carleton or anyone else, as putative owner, could foreclose or estop the municipality from asserting its title. (*Lorillard v. Town of Monroe*, 11 N. Y. 392; *Ham v. Mayor, etc.*, 70 id. 459; *Maximilian v. Mayor, etc.*, 62 id. 160; *O'Mara v. Mayor, etc.*, 1 Daly, 425; *Terhune v. Mayor, etc.*, 88 N. Y. 251.)

EARL J. These are actions of ejectment, involving the title to most of that portion of a block of land situated in the city of New York, bounded by One Hundred and Twentieth and One Hundred and Twenty-first streets, Third avenue and Sylvian place. They were commenced in April, 1878, and brought to trial in 1885 at a Circuit, and verdicts therein were directed in favor of the plaintiff.

Prior to 1838 the lands in question belonged to private owners. Early in that year a petition was presented to the common council of the city asking that they be acquired by the city for a market and public square, and the following resolution was adopted by it:

"*Resolved*, That the market committee report on the propriety of purchasing land between One Hundred and Twentieth and One Hundred and Twenty-first streets, near Third avenue, for a public market."

The committee reported, recommending the purchase of the property for the purposes mentioned, and that application be

made to the legislature for a law authorizing the taking of the property; and in pursuance of their report the following resolutions were adopted:

“Resolved, That application be made to the legislature for a law authorizing the taking of a plot of ground on the Third avenue, between One Hundred and Twentieth and One Hundred and Twenty-first streets, and running back two hundred and seventy-five feet, for public purposes by commissioners to be appointed by the Supreme Court, and that the counsel of the board prepare a memorial and law for that purpose.

“Resolved, That the market committee be authorized to purchase from the owners of the above described property any part thereof, provided the same can be obtained on reasonable terms, to be reported to and approved of by the common council.”

In pursuance of the application made on behalf of the city, the legislature passed the act (Chap. 246 of the Laws of 1839), the first section of which provided that it should be lawful for the city to acquire and become the owner in fee of the block of land in question; and section 2 provided the manner by which the city could acquire the title to the lands by condemnation proceedings. It is now claimed, on behalf of the city, that proceedings were taken in 1839 under the act to acquire title to the lands, and that by such proceedings it acquired a perfect title to them. Upon the trial, however, the city was unable to prove all the proceedings. It proved the official oath of the commissioners of estimate and assessment taken in July, 1839, which was entitled “In the Matter of the Application of the Mayor, Aldermen and Commonalty of the City of New York to take land in the Twelfth ward of said city for public use;” the report of the commissioners to the Supreme Court, dated August 18, 1839, and an additional or supplemental report, dated August 31, 1839, and an order of the Supreme Court confirming both of the reports made on the 3d day of September, 1839. There was also proof that the city had paid the amounts awarded to the owners of the

lands. The defendant claims that the act of 1839 was unconstitutional; that the proceedings taken thereunder were irregular and invalid; and that enough had not been proved to show that the court had jurisdiction to make the final order; and that, therefore, the city did not become vested with the title to the lands by virtue of those proceedings.

We do not deem it important now to determine whether, by virtue of the proceedings, the city obtained a perfect title to the lands, because we think that its possession taken under and in pursuance of them is sufficient to enable it to maintain these actions against the defendant; and they will be considered now only as they bear upon and characterize the possession of the city.

Immediately after the proceedings were closed the city took possession of the lands, and the common council passed a resolution and appropriated money for the building of a market thereon. In 1842 the common council, by resolution, directed a sale of all dwelling-houses and other buildings upon the lands except the market-house. In 1843 the city caused a strong, substantial fence to be built all around the lands, and it thereafter leased the market-house, and that was occupied under it for about twenty years. It also erected thereon two engine-houses, one prior to 1847, and the other in 1849. The lands remained inclosed, with these buildings thereon, until about 1860, when, in pursuance of resolutions adopted by the common council, the buildings were removed therefrom. In September, 1863, the common council adopted a resolution directing the street commissioner to have the lands, which were then called the Harlem Park, thrown open to the public as a park, and to have benches and seats placed therein for the accommodation of those who might resort there. This was done, and walks were made and trees planted, and the lands were used as a park for a number of years, down to 1866 or 1867, during all of which time there was a substantial fence around the same. In 1867 the property was put up by the commissioners of the sinking fund for sale at auction in separate lots. The purchasers of some of the lots took title and

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erected buildings thereon. The purchasers of others refused to take title, and such refusals resulted in litigation between the purchasers and the city, which continued for several years. During the five or six years subsequent to 1867, the lands which the purchasers refused to take were neglected, and the fences went to decay, and what was before a park was open to intruders, and to all persons who chose to go there for any purpose.

Such is the claim which the city acquired to these lands by possession prior to 1867; and this title by possession is sufficient to enable it to maintain these actions against the defendant, unless he can show a better title. (Tyler on Ejectment, 72, 73; *Allen v. Rivington*, 2 Williams' Saunders, 111 a; *Doe v. Webber*, 1 A. & E. 119; *Asher v. Whitlock*, 1 Q. B., L. R. 1; *Smith v. Lorillard*, 10 Johns. 337; *Novion v. Hallett*, 16 id. 325; *Jackson v. Denn*, 5 Cow. 200; *Whitney v. Wright*, 15 Wend. 171; *Carleton v. Darcy*, 90 N. Y. 566.)

There is no pretense of any title to the lands on the part of the defendant. He went into possession of them about 1873, as a mere intruder, without any title whatever from any person proved to have had any title or interest in them. It is true that he took several deeds of the lands within a few years after that date. But the deeds came from persons who, so far as this record discloses, were themselves mere intruders, and whose possession, if they had any, antedated the possession of the defendant by only a very short period of time. He did not show that he, or any of the persons under whom he claims title, were in possession prior to 1873, or about that time, about five years before the commencement of these actions. As against him, therefore, the prior possession of the city gave it standing for a recovery in these actions, as we held in the case of *Carlton v. Darcy* (*supra*), which involved a portion of the same tract of land now in question, unless the city so abandoned its possession prior to 1873 that it thereby lost any right or benefit which it would otherwise have from such possession.

Possession of land is *prima facie* evidence of title, and is

sufficient evidence of title as against all persons but one who can show either a prior possession or a better title. It must be a possession *animo dominendi*. The benefit of such a possession is not lost if the possessor leaves the land temporarily vacant *animo revertendi*. As against a subsequent intruder without right, such prior possession is sufficient evidence of title. But one who has entered upon the land without a title may abandon his possession intending to surrender his dominion over the same, and then any other person may enter upon the vacant land and have the benefit which possession gives even against such prior possessor. Such abandonment may be evidenced by any unequivocal act or by long continued absence from and inattention to the land, or it may be inferred from other circumstances.

Here there is no evidence that the city intended to abandon these lands. There was a short period of time, from 1867 until 1873, when so much of them as were not effectually sold were very much neglected. They were left open to the public, and the city does not appear at that time to have had any particular use for them. It could not, like an individual, live upon or personally occupy them. Having taken the proceedings to acquire the title to them, having paid for them and improved and possessed them for many years, it is not a justifiable inference from any of the evidence that it meant to abandon them and not to resume its possession of them at any time it desired. In 1871 a committee of the sinking fund commissioners, charged with the duty of making an estimate of the value of the real estate belonging to the city, included this property in their report, and during some years before and after that the city was engaged in litigation with parties who had purchased portions of the property at public sale.

We are, therefore, of opinion that the city can maintain this action, basing its right solely upon its prior possession, and that the verdict was properly directed.

But there is a still stronger and, perhaps, more satisfactory ground for the maintenance of this action, and that is the title the city acquired by its adverse possession. It went into

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the possession of these premises, claiming to be the owner thereof, as early as 1842, and it is absolutely undisputed in the evidence that it retained the possession as owner for more than twenty years thereafter, during all of which time the lands were protected by a substantial enclosure. A city, as well as an individual, may obtain title to land by adverse possession. (*Sherman v. Kane*, 86 N. Y. 57.) There is no possible ground upon which its title, by adverse possession, can be questioned by the defendant who occupies the attitude of a mere subsequent intruder without any title. The fact that he purchased the same from persons who also had no title in no way fortifies his position. (*Gardner v. Heart*, 1 N. Y. 528; *Miller v. Long Island R. R. Co.*, 71 id. 380.)

We are, therefore, of opinion that these judgments should be affirmed, with costs.

All concur.

Judgments affirmed.

HANNAH EVERSON, Respondent, v. ANDREW McMULLEN,
Appellant.

A purchaser of mortgaged premises, while technically he takes the fee, acquires simply the equity of redemption, and payment by him of the mortgage is a purchase of the interest carved out by the mortgage as a lien, and in equity he holds the fee under the mortgagee as to that interest, and under his grantor as to the equity of redemption.

Where, therefore, the purchaser of the equity of redemption, who is under no personal liability to pay the mortgage debt, pays it in aid of his own title, or procures its discharge by giving his own mortgage upon the premises in lieu thereof, as against the widow of his grantor who joined with her husband in the mortgage, but not in the deed, said grantee is entitled to the protection of the mortgagee's right as against the dower which is covered and charged by the mortgage. The purchaser takes his land charged as surety for the mortgage debt, and having paid it, has the right, as against the mortgagors, to be subrogated to the position of the mortgagee and to stand in equity as the purchaser and holder of his security, and the widow seeking to enforce in equity her right of dower, is bound to allow her due proportion of the mortgage debt.

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Bartlett v. Musliner (28 Hun, 235); *Runyan v. Stewart* (12 Barb. 537); *Wedge v. Moore* (8 Cush. 8) distinguished.

Everson v. McMullen (45 Hun, 578) reversed.

(Argued March 20, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made September 13, 1887, which affirmed a final judgment in favor of plaintiff, entered upon a decision of the court confirming the report of a referee, and also modified and affirmed as modified, an interlocutory judgment.

This action was brought by plaintiff, as the widow of Morgan Everson, to recover dower in certain premises.

On the trial the court held that plaintiff's dower interest should be charged with its just proportion of a mortgage in which she joined with her husband, which is set forth in the opinion, and an interlocutory judgment was entered accordingly, referring it to a referee to admeasure the dower. The General Term, on appeal from the interlocutory judgment modified it, adjudging that the mortgage was not to be considered in the admeasurement.

The material facts are stated in the opinion.

Howard Chipp for appellant. When a wife has joined with her husband in the execution of a mortgage upon land, and the land has been conveyed to other parties, subject to the mortgage, and the husband dies leaving the mortgage unpaid, the wife can only be endowed in the equity of redemption after contributing her ratable proportion to the payment of the mortgage debt. (*Swaine v. Perrine*, 5 Johns. Ch. 482-491; *Evertson v. Tappen*, Id. 497-513; *Bell v. Mayor, etc.*, 10 Paige, 49; *Russell v. Austin*, 1 id. 192; 4 Kent's Com. m. p. 46.) This doctrine is founded upon the equitable principle that the mortgage debt is superior to the claim for dower, and the debt must first be paid before the dower can attach. (1 Jones on Mort. [3d ed.] § 866.) By executing the mortgage she postpones her dower to the payment of the debt, and the courts hold, as matter of equity and good conscience, that

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she should contribute her ratable proportion to the payment of the debt before being allowed her dower, even though the mortgage instrument may have in some way changed its ownership or form, or even, technically, may have ceased to exist. (*Swaine v. Perrine*, 5 Johns. Ch. 482-491; *Evertson v. Tappen*, id. 497; *Popkin v. Bumpstead*, 8 Mass. 491; *Hinds v. Ballou*, 44 N. H. 619; *Brown v. Lapham*, 3 Cush. 551; *Burns v. Thayer*, 101 Mass. 426; *Howell v. Bush*, 54 Miss. 437; *Jones v. Parker*, 51 Wis. 218; *Gibson v. Crehore*, 6 Pick. 475; *Toomey v. McLean*, 105 Mass. 122; *Van Dwyne v. Thayer*, 19 Wend. 162, 171; 4 Kent's Com. m. p. 45; *De Lisle v. Herbs*, 25 Hun, 485-487; *Russell v. Austin*, 1 Paige, 192; *Champney v. Coope*, 32 N. Y. 543; *Kellogg v. Ames*, 41 id. 259.) The question for the court to decide is, not whether the mortgage instrument technically exists, but whether the debt secured by the mortgage does not equitably exist so as to compel contribution by the plaintiff. (*Swift v. Kranmer*, 13 Cal. 526; *Dillon v. Byrne*, 5 id. 455; *Kittle v. Van Dyck*, 1 Sandf. Ch. 76; *Barnes v. Mott*, 64 N. Y. 397; *Gaus v. Thieme*, 93 id. 225-232; *Em. Ind. Bk. v. Clute*, 33 Hun, 82.) The relation of surety need not exist to entitle one to subrogation. (*Gaus v. Thieme*, 93 N. Y. 232; *Murray v. Marshall*, 94 id. 611.) Even if defendant's acts should be deemed a payment, if he were a mere volunteer and stranger to the contract, such payment, without the direction or authority of the mortgagor or his representative, would not amount to a satisfaction of the debt so as to be available to the mortgagor or any party claiming under him. (*Cloer v. Borst*, 6 Johns. 36; *Bleakley v. White*, 4 Paige, 654; *Atlantic Dock Co. v. Mayor, etc.*, 53 N. Y. 67.) Although not personally liable for the mortgage debt, plaintiff ordinarily would be compelled to contribute ratably to its payment before allowance of her dower, and if she elects to consider defendant's acts as payment and satisfaction, then she is under an obligation, which equity will enforce, to indemnify by contributing to the debt. (*Wellington v. Kelly*, 84 N. Y. 543-547.)

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G. D. B. Hasbrouck for respondent. Notwithstanding the fact that the plaintiff joined her husband in the execution of the \$12,000 mortgage, the release and discharge thereof, as against the premises described in the complaint, restored completely her right to dower therein. (*Maloney v. Horan*, 49 N. Y. 118, 119; *Hinchcliffe v. Shea*, 103 id. 155; *Robinson v. Bates*, Metcalf, 40; *Kitzmiller v. Van Renslaer*, 10 Ohio St. 63; *Littlefield v. Crocker*, 30 Me. 92; Scribner on Dower, chap. 12, 349; 2 id. 250.) There was no mistake of fact, and consequently no equitable redress for the defendant. (*Weed v. Weed*, 94 N. Y. 243; *Shotwell v. Murray*, 1 Johns. Ch. 316; Potter's Willard's Eq. Jur. 96.) Where the mortgage had been released, satisfied or discharged by the alienee of the husband, even though his wife had joined in the deed, or it had been made and executed prior to his marriage, it cannot, by the grantee, be afterwards set up against the claim of the wife for dower. (*Bartlett v. Musliner*, 28 Hun, 235; *Runyan v. Stewart*, 12 Barb. 537; *Hitchcock v. Harrington*, 6 Johns. 290; *Collins v. Torry*, 7 id. 278; *Coates v. Cheever*, 1 Cow. 479; *Jackson v. De Witt*, 6 id. 316; *Wedge v. Moore*, 6 Cush. 8; *Trustees v. Wheeler*, 61 N. Y. 118; 1 Wash. on Real. Prop. 227; 2 Scribner on Dower, 250; *Platt v. Brick*, 35 Hun, 127; *Everson v. McMullen*, 42 id. 369.) The action for dower is a legal action. (31 Hun, 82, 461; *Swaine v. Perrine*, 5 Johns. Ch. 487; *Smith v. Gardner*, 42 Barb. 356.) The wife's deed or mortgage of her husband's lands cannot stand independently of the deed of her husband, when not executed in aid thereof, nor can she by joining with her husband in a deed of lands to a stranger, in which she has a contingent right of dower, but in which the husband has no present interest, bar her contingent right. (*Marvin v. Smith*, 46 N. Y. 571.) The claim to be subrogated is an equitable one, and ought to be permitted only where its exercise results in justice. When there is an intervening equity, the right to subrogation will be denied. (*Hyde v. Tanner*, 1 Barb. 76; *Runyan v. Stewart*, 12 id. 537; *Bayles v. Husted*, 40 Hun, 396; *Spencer v. Spencer*, 95 N. Y. 353; *Murray v. Marshall*, 94 id. 611; Thomas on

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Mort. 204; *Bank of Albion v. Burns*, 46 N. Y. 479; *Smith v. Townsend*, 25 id. 479; *Fitch v. Cotteral*, 2 Sand. Ch. 29; 1 Hilliard on Mort. 546.) Where the mortgage has been permitted to be set up as against the widow's claim for dower, it has been in life with the mortgagee holding under it. (*Bartlett v. Musliner*, 28 Hun, 235; *Jackson v. De Witt*, 6 Cow. 316; *Denton v. Naimy*, 8 Barb. 618; *Delisle v. Herb*, 25 Hun, 485.) A defendant claiming under the husband, by a conveyance subsequent to coverture, stands absolutely estopped, to deny the paramount right of the widow, to claim that he paid the money which went to discharge a mortgage, which he was never under obligation to pay. He was a volunteer, and, as such, not entitled to relief. (*Pearce v. Bryant Coal Co.*, 11 West. Rep. 379; Sheldon on Subrogation, § 3; *Gadesden v. Brown*, Speers Eq. [S. C.] 41; *Sandford v. McLean*, 3 Paige, 117; *Banta v. De Garmo*, 1 Sandf. Ch. 384; *Wilkes v. Harper*, 1 N. Y. 586; *Douglass v. Fogg*, 8 Leigh, 588; *Huigh v. Etna L. Ins. Co.*, 57 Ill. 318; *Small v. Stagg*, 95 id. 39.) If the land of the wife is mortgaged for the husband's debt, a subsequent judgment-creditor of the husband cannot claim that the mortgagee shall proceed first upon the property of the wife, nor can he claim to be subrogated to the mortgagor's security against the wife, because the equity of the latter is superior to that of the husband. (Bispham's Principles of Equity, § 342; *Warner v. Van Alstyne*, 3 Paige, 513, 515; Willard's Eq. Jur. [Potter's ed.] 569; *Everson v. McMullen*, 42 Hun, 369.)

FINCH J. We are required to settle on this appeal the disagreement between the trial court at the first hearing and the General Term, and determine which decision was correct.

The property in question was owned originally by Morgan Everson who mortgaged it to the Rondout Savings Bank for \$12,000; his wife, who is the present plaintiff, joining with him in the mortgage to cover her inchoate right of dower. Everson died soon thereafter, and his executor

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sold the equity of redemption at public auction for one dollar. The case does not disclose the authority upon which he acted, but nobody disputes it, and the action was tried upon the assumption that a valid title existed in the purchaser. That purchaser was Coykendall, who assigned his bid to Preston, to whom the executor's deed was made. Preston took title before August, 1877, and thereupon gave a new mortgage to the savings bank upon the property for \$2,000 to further secure an accumulation of interest upon the original mortgage. It appears that Preston gave a bond accompanying the mortgage, and so became personally liable for a possible deficiency, and the bank gained that additional security for its unpaid interest; but while it is said generally that the mortgage was given to pay the interest, it is not shown that the mortgagee accepted the new securities as a payment *pro tanto* upon the original incumbrance by any indorsement or equivalent action, or held them in any other way than as collateral to the original debt. In August, 1877, Preston and his wife conveyed to Crosby by a quit-claim deed, but containing a provision by which the latter assumed and agreed to pay the \$2,000 mortgage given by Preston to the bank as a part of the consideration for the purchase. The consideration named in the deed was \$221. Preston did not on his purchase assume or become liable to pay any part of the original mortgage, but took title merely subject to its lien. When he gave his \$2,000 bond and mortgage it was in aid of his own title, and not in pursuance of any duty due to the representatives of the mortgagor. Probably his obligation was merely collateral to the primary lien, and so both he and his land became sureties for the unpaid interest; but if not, and the new mortgage was a payment of so much of the old debt, it was entirely voluntary, and he, and Crosby who took his place, stood in the attitude of sureties after paying the unpaid interest, entitling them to subrogation as against the land. Crosby thereafter conveyed a portion of the property to McMullen by a warranty deed, free and clear of all incumbrance. He was enabled to do this by an arrangement at the time to which his grantee and the bank

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were parties. The substantial point of that arrangement was a distribution of the original mortgage in agreed proportions between the two parcels into which, by McMullen's purchase, the land was to be divided. To effect this separation and severance of the lien McMullen gave the bank a mortgage on his parcel for \$5,500 as a substitute for \$4,000 of the principal of the original mortgage, and of the unpaid interest collaterally secured by the bond and mortgage of Preston, \$500 of the interest having been paid in cash by Crosby. The bank on its part formally released McMullen's parcel from the lien of its original mortgage, indorsing thereon a payment of \$4,000, and canceled and discharged the \$2,000 mortgage of Preston, and Crosby was thus enabled to make his conveyance free from incumbrance.

On this state of facts the widow demanded dower in McMullen's parcel. The Special Term, on the first trial, held that she was bound to allow as against her dower a just proportion of the original mortgage and its interest, and sent the case to a referee to ascertain that just proportion, with a direction that the McMullen mortgage should be recognized and allowed in ascertaining the amount of such indebtedness. The General Term, on the contrary, were of opinion that the widow was not bound to contribute, and should have dower in the whole parcel without allowance or diminution; and it is that controversy which awaits our judgment. It is not doubtful on which side the equity exists. The widow subordinated her dower to the payment of the husband's debt. Whoever, in the room of a foreclosure by the mortgagee, pays that debt to him when under no personal liability for its discharge, is entitled in equity to the protection of the mortgagee's right as against the dower which it covered and charged. The purchaser from the husband acquired only the equity of redemption. While, technically, he took the fee, in truth he took it subject to the interest of the mortgagee carved out of it by the mortgage as a lien. Payment to the mortgagee in an equitable sense, is a purchase of that interest from him, and in equity the owner of the fee holds it under

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the mortgagee as to that interest, and under the husband only as to the equity of redemption. That is an answer to the doctrine invoked by the respondent that a release of dower is available only to one who claims under the very title which was created by the conveyance with which the release is joined. (*Malloney v. Horan*, 49 N. Y. 118.) That would be a good answer to the appellant's claim in a court of law, possibly, but does not govern his case in equity, since there the truth of his holding, outside of the legal form, is under the mortgage to the extent of the mortgage debt. For his payment of that debt is not a duty which he owes to the husband's estate or to any one, but a transaction in his own interest, the exact and obvious purpose of which is to add the right of the mortgagee to the right bought of the husband. The widow is left where her own voluntary act placed her. By joining in the mortgage she postponed her dower to the equity of redemption. She has that right still, and seeks to enlarge it because of a payment made not by her husband, or in performance of a duty due to him or those representing him, but by one acting wholly in his own interest and seeking to add to that as acquired from the husband the further right held by the mortgagee. The purchaser in the present case took his land charged as surety for the husband's debt. While he, personally, was not bound to pay it, his land was held, and paying the debt of husband and wife, as represented by the mortgage, he had a right, as against them, to be subrogated to the position of the mortgagee and to stand in equity as the purchaser and holder of his security.

Thus far I have assumed that the giving of the new mortgage operated as a payment, *pro tanto*, of that held by the bank. That is a needless concession, because the finding in this case rebuts any intention of payment, and establishes that a severance of the original lien was all that was contemplated by the parties, and the giving of the new mortgage was meant, in its practical effect, to serve as a transfer of so much of the original lien to the severed parcel. Equity may look through the form of the transaction to ascertain its substance, and so looking

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cannot fail to see that the new mortgage is so much of the old one in a changed form, but secures the old debt as did its predecessors. The finding is justified by the facts, and upon that basis the dower remains subject to the proportionate part of the original lien.

I think these views are fully sustained by the authorities. In *Swaine v. Perrine* (5 Johns. Ch. 491), the mortgage given by the husband and wife was outstanding at his death; the equity of redemption passed to the heir who redeemed the land by paying the mortgage, and the widow who claimed dower was required to contribute her ratable proportion of the redemption money. In *Popkin v. Bumstead* (8 Mass. 491), the husband and wife joined in a mortgage to one Capen, and after the death of the husband his administrator, under the order of the probate court, sold the equity of redemption to Wheelock, who conveyed it to Bumstead. The latter paid off the mortgage and it was discharged of record. The widow thereupon demanded her dower, but the court held she was barred. This case, which is very like the one at bar, was cited in *Van Dyne v. Sayre* (19 Wend. 171), with apparent approval. Judge COWEN reviews many of the cases and holds that *Collins v. Torry* (7 Johns. 278), and *Coates v. Cheever* (1 Cow. 475), were decided without full consideration. Near the close of his opinion he says: "My deduction from this and other cases, I state in the words of Chancellor KENT (4 Comm. 45 [3d ed.]), the wife's dower in the equity of redemption only applies in case of redemption of the incumbrance by the husband or his representatives, and not when the equity of redemption is released to the mortgagee or conveyed." I am not aware that the authority of that case has been overthrown.

The cases cited in behalf of the widow confirm rather than question the views we have expressed. In *Bartlett v. Musliner* (28 Hun, 235) the purchaser had assumed and agreed to pay the mortgage debt as a condition of his purchase, and, having come under that obligation, might be deemed to have paid in behalf of the husband or his estate. The distinction is referred to in Jones on Mortgages (vol. 1, § 866), where it is

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said that, if the mortgage "be redeemed by the heir or purchaser, or by any one interested in the estate *who is not bound to pay the debt*, to avail herself of this right she must contribute her proportion of the charge according to the value of her interest." In *Runyan v. Stewart* (12 Barb. 537) the action was at law, and, while a majority of the court sustained the claim of dower, it was explicitly said that the result would be different in equity. In that case Runyan and his wife gave a mortgage, and thereafter the husband gave a conveyance to Baker, who assumed the payment of the mortgage. The court question the case of *Popkin v. Bumstead* (*supra*), but add that, in equity, Baker might be subrogated and have a decree for contribution. No reference was made to the assumption of the mortgage by Baker. In *Jackson v. Dewitt* (6 Cow. 316) there was a release to the mortgagee and dower was denied. In *Wedge v. Moore* (6 Cush. 8) the whole argument is founded upon an assumption of the mortgage debt by the purchaser, which is argued out from the facts. In *Platt v. Brick* (35 Hun, 127) the action was by the purchaser of the equity of redemption, who was not bound to pay the mortgage debt, to compel the mortgagee to assign his mortgage for the protection of the purchaser's title against dower, its amount having been tendered. The court held that the assignment could be compelled; that there was a right of subrogation; that the assignment would not work a merger, and the mortgage could be interposed against the claim of dower. Of course, the technical or formal assignment is material only as showing a transfer rather than a payment, and where no payment was intended or made, but the mortgage debt subsisted in the new mortgage given, the result must be the same.

On the whole, I am satisfied that where the purchaser of the equity of redemption is not bound to pay the mortgage debt, but does, in fact, pay it in aid of his own title and estate, whereby it is discharged, the claim of dower is subject to a just contribution. And the case is stronger where, as here, the technical payment consists in the substitution of a new mortgage intended to operate as and take the place of so much

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of the old one. The debt to which the dower was subordinated is changed in form, but, in fact, remains, and the discharged security may be revived when equity so requires. (*Gans v. Thieme*, 93 N. Y. 225.)

The judgment of the General Term and of the Special Term should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

ANN MARIA DEEN, Respondent, v. WILLIAM MILNE, as
Executor, etc., Appellant.

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Where a stipulation between the parties to discontinue an action in the Marine Court of the city of New York and that a judgment therein shall be discharged and vacated of record had been lost, *held*, that the judgment-debtor could maintain an action to establish and compel the specific performance of the contract; that, assuming such debtor had a remedy by motion in the Marine Court, as to which *quære*, this was no defense to the action.

It is not a fatal obstacle to a suit for a specific performance that the contract does not relate to lands.

In such an action it appeared that, upon the trial of an action brought by the defendant against the plaintiff in the Supreme Court, the court held that the Marine Court judgment was a bar, and that to remove the obstacle the parties entered into the stipulation to discontinue. *Held*, that there was a sufficient consideration for the agreement.

It seems an agreement to discontinue an action includes, as a necessary consequence the vacation of a judgment, either interlocutory or final, entered therein.

Mere delay for a period, short of that prescribed by the statute of limitations, does not necessarily bar the action for specific performance of such an agreement; it must appear that changes have taken place and circumstances occurred, rendering it inequitable to enforce the performance.

Peters v. Delaplaine (49 N. Y. 362) distinguished.

(Argued March 20, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 30, 1888, which modified, and affirmed as

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modified, a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought to establish and to compel the specific performance of an alleged stipulation for the discontinuance of an action in the Marine Court of the city of New York, wherein the plaintiff here was plaintiff and the defendant's testator was defendant, and the cancellation of a judgment entered therein against the plaintiff for costs.

The material facts are stated in the opinion.

Edward C. Perkins for appellant. The bare fact of the loss of a written instrument does not give a court of equity jurisdiction to enforce it. (*Walmsley v. Child*, 1 Ves. 341, 345; *Whitefield v. Faussat*, 1 id. 392; *East India Company v. Boddam*, 9 id. 466; *Mossop v. Eadon*, 16 id. 430, 434.) Whether relief is sought on the ground that the stipulations were lost, or on other grounds, the suit will not be entertained, if there is an adequate remedy at law. (Pomeroy's Eq. Jur. §§ 716, 717.) Plaintiff has an adequate remedy at law by motion in the City Court. (*Barry v. Mutual Ins. Co.*, 53 N. Y. 539; *Diets v. Farish*, 43 Super. Ct. 87; *Dinmore v. Adams*, 48 How. Pr. 274; *Gould v. Mortimer*, 16 Abb. Pr. 449; *Brown v. Frost*, 10 Paige, 243; *Nicholl v. Nicholl*, 8 id. 350; *McCotter v. Jay*, 30 N. Y. 80; *Libby v. Rosekrans*, 55 Barb. 219; *Am. Ins. Co. v. Oakley*, 9 Paige, 259.) The application to a court of equity for the rescission, cancellation or delivering up of written instruments and for specific performance, is not, strictly speaking, a matter of absolute right, upon which the court is bound to make a final decree. (Story's Eq. Jur. § 693; *Seymour v. Delancy*, 6 Johns. Ch. 223; *Columbia College v. Thatcher*, 87 N. Y. 311.) By her gross laches, the plaintiff has forfeited any possible claim for relief. (*Smith v. Clay*, 3 Bro. Ch. 640; *Delevan v. Duncan*, 49 N. Y. 435; Story's Eq. Jur. § 78; Pomeroy's Eq. Jur. § 828; *Grymes v. Saunders*, 93 U. S. 55; *Godden v. Kimmell*, 99 U. S. 201; *Stearnes v. Page*, 7 How. 819, 828; *Lansdale v. Smith*, 106 U. S. 392; *Holgate v. Eaton*, 116

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id. 33, 40; *Richards v. Marshall*, 124 id. 183; *Hayman v. Nat. Bk.*, 96 id. 611, 617; *Peters v. Delaplaine*, 49 N. Y. 367.) There was no consideration moving from the plaintiff for the stipulation; if made, it was an arrangement required by the court as a condition of continuing and carrying to a conclusion the litigation before the court, and one which imposed no burden on this plaintiff; and as that litigation has been discontinued by the parties, it was not intended and is not reasonable that the arrangement should be enforced. (Pomeroy's Eq. Jur. § 404.) Neither the evidence as to the making of the written stipulation nor that as to the purport of the oral stipulation is sufficiently clear to justify the interference of a court of equity. (*Hennessy v. Woolworth*, 128 U. S. 438, 442; *Colson v. Thompson*, 2 Wheat. 126; *Huddleston v. Briscoe*, 11 Ves. Jr. 591; *Harnett v. Yeilding*, 2 S. & L. 552, 553; *Badger v. Badger*, 2 Wall. 87, 95; *A. D. Co. v. James*, 94 U. S. 207.) An interlocutory judgment does not constitute *res adjudicata*, because it is only an intermediate step in the suit. (*Met. El. R. R. Co. v. Manhattan Co.*, 14 Abb. N. C. 215.) The oral agreement claimed to have been made between counsel is not enforceable. (*Carney v. Cooper*, 7 Paige, 588; *Livingston v. Gibney*, 25 How. Pr. 1; *Banks v. Tract Society*, 4 Sandf. Ch. 438.) To declare that a judgment in another court valid when entered, and not impeachable for fraud or want of jurisdiction, be vacated and canceled of record is beyond the power of the Supreme Court. (Story's Eq. Jur. §§ 875, 1571, 1572, 1574.)

Esek Cowen for respondent. The loss of a paper, the existence of which is essential to the rights of a party, has always been held to be ground for equitable relief. (Story's Eq. Jur. §§ 81-89; Willard's Eq. Jur. 52.) In contracts relating to personal property a specific performance will be decreed if damages alone are not an adequate remedy. (Pom. on Specific Performance of Cont. §§ 10-20, 22; *Kelly v. Dee*, 2 T. & C. 286; *Phillips v. Wicks*, 38 Super. Ct. 74.) The Supreme

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Court had ample jurisdiction to entertain the action and to grant the relief demanded in the complaint, and finally given by the judgment appealed from. (*Jewett v. A. C. Bank*, Clarke's Ch. 242; *Harper v. Hall*, 1 Daly, 498; *McMahon v. Rauhr*, 3 id. 116.)

PECKHAM, J. Upon the trial in the Supreme Court of the action of *Wilson v. Deen*, the parties entered into an agreement in writing that a former action commenced in the Marine Court of New York by Mrs. Deen against Wilson, in which the defendant had obtained judgment for costs, should be discontinued and the judgment entered therein should be vacated and canceled. This is one of the findings of fact made in this case, and, although the evidence is to some extent, perhaps, conflicting, yet there is enough upon which the trial court could base its findings within any rule as to the clearness and fullness with which an agreement must be proved where a decree for a specific performance of its terms is asked for.

The original written stipulation signed by the attorneys for the plaintiff in the suit in the Supreme Court has been lost, but its terms were quite sufficiently proved by the production of a duplicate signed by the attorneys for the other side at the same time. It was executed on or about December 2, 1874. The judgment of the Marine Court has never, in fact, been vacated of record, and this action was commenced July 22, 1884, and the relief asked for was that the Marine Court judgment might be vacated and set aside by reason of the agreement above mentioned (and which was set forth in the complaint, and its loss alleged), and that the defendant should be required to file in the Marine Court the consents in his possession, or under his control, to the vacating of such judgment, and that such action should be adjudged discontinued by the consent of the parties. The defendant answered, setting up several defenses.

The action is simply one to compel the specific performance of the agreement to discontinue the Marine Court action and to vacate the judgment entered therein.

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Although the agreement does not relate to lands, yet that is no fatal obstacle to a suit for a specific performance. (Pomeroy on Con., Spec. Per. § 10 *et seq.* and authorities cited in notes.)

The contract having been lost, the plaintiff herein could not go to the clerk of the Marine Court and ask to have the judgment vacated of record on her mere statement as to what such agreement was. Possibly, if the stipulation were in existence, the plaintiff might have produced it to the Marine Court and asked to have an entry vacating the judgment properly made. But it was lost, and in order to obtain any relief it was necessary to establish, or, in other words, to prove the making of the agreement, and then have it specifically enforced. There was no adequate remedy at law in the sense in which that term is used under such circumstances. In refusing the specific performance of a contract duly proved, but of which, for some reason, it is held to be inequitable to decree specific performance, the court says, upon such refusal, that it leaves the party to his remedy at law, meaning thereby to an action at law to recover his damages for the refusal of the defendant to carry out his contract. The plaintiff here has no such remedy which is at all adequate. It is by no means clear that the plaintiff had any remedy by motion in the Marine Court, for she would have to establish the agreement and then ask the court to carry it out on motion. Whether the Marine Court has any such equitable power is, perhaps, questionable. But the cases where the court has refused to take jurisdiction of an original suit to set aside a sale made in another suit, under a decree for such sale, have no bearing here. They were cases of original bills filed to obtain a resale of mortgaged premises under a decree in a former suit, where the sale was alleged to be irregular for some reason, or the application was on the ground of inadequacy of price, surprise, and the like; and it has been always held that such relief must be asked for in the original suit and on motion to open the sale and have another one ordered. Such are the cases of *Nicholl v. Nicholl* (8 Paige, 349); *American*

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Insurance Company v. Oakley (9 id. 259); *Brown v. Frost* (10 id. 243); *Libby v. Rosekrans* (55 Barb. 202, 219); *McCotter v. Jay* (30 N. Y. 80); *Gould v. Mortimer* (16 Abb. Pr. 448). The cases proceed upon the assumed validity of the judgments, but ask to have the sale thereunder set aside and a new sale ordered, for the reason of some alleged irregularity or as a favor.

Here the plaintiff must establish an agreement, and then the court is asked to specifically enforce it. The fact that the agreement when established or proved relates to the vacating of a judgment in some other court is wholly immaterial. It is the defendant who has agreed to have it vacated, and the court is asked to compel him to perform his contract. If the plaintiff had another remedy by motion to another court to compel the defendant to thus perform his contract, it would be no answer to this action, for in such event it would only show that the plaintiff could apply in either court and obtain relief on proving his case. In both courts the character of the relief would be the same, the contract would be specifically performed and the judgment would be vacated. It is in no sense the case of another and adequate remedy at law.

The defendant also claims there was no proof sufficiently clear and convincing in its character, as to what the agreement between the parties in fact was, to authorize a decree for its specific performance. A portion of the alleged agreement was, however, proved beyond any room for cavil or dispute. There was a conflict as to whether there was, when the agreement was made, a written stipulation also entered into, and also as to what were the terms of the oral agreement, and it is contended by the defendant that the oral agreement to discontinue (which is admitted to have been made), related only to a discontinuance of the appeal which had been taken by the plaintiff (Mrs. Deen) from the Marine Court judgment, and not to the discontinuance of the action itself. But the conceded condition of the case then on trial in the Supreme Court shows overwhelmingly that the agreement must have been one to discontinue the action, for such discontinuance was the only answer that could

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have been made to the objection, which all agree was taken by the trial judge, to going on with the case while the action remained in the Marine Court. There is no doubt in our minds from reading the evidence that it was proved clearly, and beyond any fair doubt, that there was an agreement to discontinue the action in the Marine Court, and that thereupon the trial in the Supreme Court proceeded to judgment. It is thus wholly immaterial whether the stipulation to discontinue and to vacate the judgment was ever entered into in writing or not, and equally immaterial whether or not the writing (if originally made at the trial), contained anything but a stipulation to discontinue the action. Either the oral agreement or the written stipulation to discontinue the action included as a consequence the vacation of the Marine Court judgment, whether so expressed or not. (*Loeb v. Willis*, 100 N. Y. 231.) This is the effect of the decision in the above case. It is true there was an interlocutory judgment entered in that case; but we do not see any difference, so far as this question is concerned, between an interlocutory and a final judgment, as both are included in the meaning of such a stipulation.

The defendant also contends that there have been great laches in this case, and that hence, although the action was brought before the statute of limitations attached, yet he claims that the courts do not take jurisdiction of actions such as this and enforce their specific performance, where, by reason of the delay, it would be against equity and good conscience so to do. The principle contended for is undeniable. (*Peters v. Delaplaine*, 49 N. Y. 362.) But mere delay, short of the statute, does not necessarily bar the action. There must be facts from which it appears that changes have taken place, and circumstances have occurred on account of which it would be inequitable to enforce the performance. In the case cited above almost every conceivable reason was present which went to prove that it would have been gross injustice to make such a decree therein. Nothing of the kind appears here. The plaintiff never discovered the loss of the stipulation until in May, 1883, and the action was commenced in July, 1884. The only reason

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that can be suggested of any harm to the defendant's side of the controversy on account of this lapse of time, lies in the fact of the death of the defendant's testator, who was in court as one of the parties when the agreement was made. But what has already been said is an answer to this objection. Upon the conceded facts of the case there can be no doubt that there was an agreement to discontinue something, and, from the same facts, we think there can be no doubt that the agreement was to discontinue the Marine Court action, which, as we have seen, included the vacation of the judgment in that court. No real harm can, therefore, have happened defendant, owing to the death of his decedent and the consequent loss of his testimony, for the agreement to discontinue the action was proved substantially from the testimony in which all parties agreed, and from which the agreement to vacate the judgment followed as a necessary inference.

We also think the plaintiff, in the Supreme Court action, obtained full consideration for the making of the agreement to discontinue the Marine Court action. He had brought his action in the Supreme Court and found an insuperable obstacle to its trial, under the rulings of the judge, in the existence of the Marine Court judgment, and, in order to get rid of such obstacle, and to enable him to go on with the trial of his action in the Supreme Court, the parties agreed to discontinue the Marine Court action; and thereupon the trial proceeded and the plaintiff therein succeeded and obtained a judgment, which was finally reversed in this court. (*Wilson v. Deen*, 74 N. Y. 531.) The consideration for the agreement was, therefore, ample.

We have looked through the case relating to the alleged errors in the admission of evidence, but find none to justify a reversal of the judgment.

It should, therefore, be affirmed, with costs.

All concur, except GRAY, J., not sitting.

Judgment affirmed.

Statement of case.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF
NEW YORK, Respondent, v. THE TWENTY-THIRD STREET
RAILWAY COMPANY, Appellant.

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The act of 1873 (Chap. 647, Laws of 1873), requiring the B. S. & F. F. R. R. Co., a street railroad corporation organized under the General Railroad Act (Chap. 140, Laws of 1850), to pay into the treasury of the city of New York one per cent of the gross receipts instead of a license fee as before prescribed (Chap. 199, Laws of 1878), is constitutional; it must be deemed an alteration and amendment of the charter of the company, and so is within the power reserved to the legislature by the general act, the provisions of the Revised Statutes to which corporations organized under said act are by its terms made subject and the state Constitution. (Art. 8, § 1.)

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While under the power so reserved the legislature cannot deprive a corporation of its property or annul its contracts with third persons, it may take away its franchise to be a corporation, or prescribe the conditions and terms upon which it may live and exercise such franchise.

The said company leased its property rights, privileges and franchises to the defendant. There was nothing in the lease imposing upon the lessee the obligation to pay the percentage. In an action to compel such payment, *held*, that, while no such obligation was imposed by the acts authorizing said company to lease its road (Chap. 199, Laws of 1873; chap. 389, Laws of 1875) or by any statute, defendant upon taking the place of its lessor, as to its charter rights and power, took its place also, as to its charter obligation and duties, and was not entitled to exercise the former without discharging the latter; and that, therefore, the action was maintainable.

Reported below, 48 Hun, 552.

(Argued March 31, 1889; decided April 16, 1889.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 24, 1888, which denied a motion to set aside an interlocutory judgment herein and for a new trial, made pursuant to section 1001 of the Code of Civil Procedure.

This action was brought to compel defendant, as lessee of the Bleeker Street and Fulton Ferry Railroad Company, to account and to pay over to the city one per cent of its gross receipts from the operation of the leased road. The interlocu-

Statement of case.

tory judgment adjudged plaintiff to be entitled to the relief sought and directed an accounting.

The material facts are stated in the opinion.

Leslie W. Russell for appellant. A tenant or a sub-tenant is not bound to pay taxes and assessments unless he assumes them. (*Van Rensselaer v. Dennison*, 8 Barb. 23; *Collins v. Hasbrouck*, 56 N. Y. 157.) The plaintiff has no standing as a creditor to follow the assets of the Bleecker Street Company into the hands of the defendant. (*People v. Fire Assn. of Phila.*, 92 N. Y. 311; *People v. Home Ins. Co.*, Id. 328.) The act (chap. 647, Laws of 1873) did not create a corporation. The grant was to twelve men and their assigns. There was no right of succession in a corporate sense. The rights of any one of the grantees would have passed on his death to his personal representatives. (*White v. Miller*, 71 N. Y. 118, 126; *In re Kerr*, 42 Barb. 119; *New Orleans v. Delamore*, 114 U. S. 501; *Memphis Co. v. Commissioners*, 112 id. 609.)

Thomas Allison for respondent. The language of the statutes is not to be interpreted literally, but the intention of the legislature thereby expressed is to be sought for, and in case of any doubt or ambiguity the solution thereof is to be in favor of plaintiff. (*People ex rel. Wood v. Lacombe*, 99 N. Y. 43, 49, 54; *People ex rel. Twenty-third Street R. R. Co. v. Comrs. of Taxes*, 95 N. Y. 558; *Burch v. Newbury*, 10 id. 389; *O. S. F. v. Dalloway*, 21 id. 461; *People v. N. Y. C. R. R. Co.*, 13 id. 78; *Donaldson v. Wood*, 22 Wend. 397; *W. T. Co. v. McKean*, 6 Hill, 619; 3 Bing. 193; *Comm. v. Kimball*, 24 Pick. 370; *Mayor, etc., v. B., etc., R. Co.*, 97 N. Y. 281.) The plain intent of the legislature was that in return for the use of the streets for this railroad the city should receive "one per cent of" not on "the gross receipts" from the exercise of the franchise. (*B. & S. A. R. R. Co.*, 97 N. Y. 275; 17 Hun, 242; 28 id. 323.) The legislature had power to impose upon the Bleecker Street and

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Fulton Ferry Railroad Company the liability to pay to the city this percentage of their gross receipts. (*Mayor, etc., v. D. D., E. B. & B. R. R. Co.*, 112 N. Y. 137; *Miller v. People*, 15 Wall. 478, 479; *People v. Hills*, 46 Barb. 344; *Tomlinson v. Jessup*, 15 Wall. 454; *S. & S. P. R. Co. v. Thacher*, 11 N. Y. 102; *B. & N. Y. C. R. R. Co. v. Dudley*, 14 id. 336; *In re Oliver Lee & Co.'s Bk.*, 21 id. 9; *A. N. R. Co. v. Browne'l*, 24 id. 345, 350.) Though the reserved power of the legislature to alter and modify corporate charters is not limited to acts which shall not be injurious to the corporation, yet the corporation cannot complain of an act not shown to be injurious to it. (*S. & S. P. R. Co. v. Thacher*, 11 N. Y. 102.) The presumption is that the company itself procured the passage of the very act now in controversy. Especially is this so in view of the absence of any proof that it was injurious to the company when passed, and the strong probability that it was then beneficial to it. (*Mayor, etc., v. B., etc., R. R. Co.*, 97 N. Y. 275, 281; *Mayor, etc., v. D. D., E. B. & B. R. R. Co.*, 112 id. 137.)

EARL, J. By chapter 514 of the Laws of 1860, Steven R. Roe and others were authorized and empowered to "lay, construct, operate and use a railroad with a double or single track, as hereinafter provided, and to convey passengers thereon for compensation through, upon and along" the streets mentioned. Some time prior to the 12th day of December, 1864, the Bleecker Street and Fulton Ferry Railroad Company was organized under the general railroad act of 1850, and the several acts amendatory thereof; and the route of its railroad, as set forth in its articles of association, was the same as that over which Roe and others, named in the act of 1860, were authorized to construct and operate a railroad. On the 12th day of December, 1864, all the rights, privileges and franchises conferred upon Roe and others by the act of 1860, were assigned and transferred by them to, and the same became vested in, the Bleecker Street and Fulton Ferry Rail-

road Company. By the act chapter 199 of the Laws of 1873, the railroad company was authorized and empowered to extend its railroad, and by section 3 of that act it was, among other things, enacted as follows :

“In the construction, use and operation by the said company of the tracks and extensions authorized by this act, the company shall have and exercise the same rights and privileges which are now possessed and exercised under former grants and laws, and may use said road in connection with the roads of other railroad companies in said city, upon such terms as may be agreed upon between said companies and other railroad companies, and said company is hereby authorized to lease all or any portion of their said road, or to consolidate the same with any other railroad companies. The said company shall pay to the corporation of the city of New York a license fee of fifty dollars for each and every car used by them on said extensions.”

A little more than a month later the legislature passed the act chapter 647 of the laws of that year, which is as follows :

“The Bleecker Street and Fulton Ferry Railroad Company, of the city of New York, shall in lieu of the payment to the corporation of the city of New York of a license fee of fifty dollars for each and every car used by said company, specified in section 3 of chapter one hundred and ninety-nine of the Laws of 1873, annually, on the first day of October, pay into the treasury of the city of New York, one per cent of the gross receipts of said company, the amount of which gross receipts shall be determined by the sworn statement of the president and treasurer of said company, but subject to the inspection of their books by the comptroller of said city, provided, however, that said payment of one per cent shall not commence to be computed until October first, in the year eighteen hundred and seventy-five, unless the extension of said railroad granted by chapter one hundred and ninety-nine of the Laws of eighteen hundred and seventy-three, shall be completed and in operation prior to said date; and in such case, then said computation of one per

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cent shall commence from the date of said completion and operation of said extension of said railroad."

By the act chapter 369 of the Laws of 1875, any railroad company was authorized to take a lease of all or part of the Bleecker Street and Fulton Ferry Railroad Company, provided the stockholders of that company, holding a majority of stock, assented thereto. On the 10th day of January, 1876, the Bleecker Street and Fulton Ferry Railroad Company, as party of the first part, duly executed and delivered to the defendant, the Twenty-third Street Railroad Company, as party of the second part, a lease, whereby it demised and leased to the defendant, its successors and assigns, the railroad of the party of the first part, and the extensions thereof, "which the party of the first part is authorized to construct, together with all the property, real and personal, pertaining to and connected with said railroad and extensions, except its depot and stable grounds and premises held under lease from the mayor, aldermen and commonalty of the city of New York, and the buildings thereon, now in use by the party of the first part; also all cars, horses, harness and rolling stock; also the rights, licenses and privileges of the party of the first part, possessed and enjoyed under and by virtue of chapter 514 of the Laws of 1860, and chapter 199 of the Laws of 1873, and chapter 389 of the Laws of 1875, and of any and every act passed and to be passed amendatory thereof; to have, use and hold the right and interest of the party of the first part in all and singular the above demised premises, property, estate, effects, privileges, licenses and immunities aforesaid unto the party of the second part, its successors and assigns, from the day of the date hereof, for and during the term of ninety-nine years, yielding and paying therefor unto the party of the first part, its successors or assigns," in addition to a present consideration of \$50,000, to be applied towards liquidating the floating debt of the party of the first part, an annual rent as follows: An annual dividend of one and one-half of one per cent upon the capital stock of the party of the first part, "it being understood that the dividends to be paid as aforesaid shall

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and may be paid directly to the respective stockholders," and "semi-annually the interest accruing and to become due and payable from and after the 1st day of July, 1876, upon \$700,000 of first mortgage bonds, made by the party of the first part and now outstanding." It was further provided that the party of the first part should, during the continuance of the lease, retain and keep its organization, and also as follows: "And the party of the first part also covenants and agrees that, upon the request of the party of the second part, it will execute to any railroad company a lease of any portion of the railroad, or extension, or property herein referred to, on such conditions as the party of the second part may propose, or that it will join the said party of the second part in such leases."

Under and pursuant to the lease, the defendant, on or about September 29, 1876, entered upon the demised property, but it has operated only a portion of the road demised, the remainder thereof having been leased to and operated by other companies. A demand has frequently been made upon defendant and upon the Bleecker Street and Fulton Ferry Railroad Company for the statement required by the act, chapter 647 of the Laws of 1873, and for the payment of the percentage specified in that act; but such statement and payment have been refused although the gross receipts from the exercise and operation by the defendant of the franchises and of the railroad have been very large. The courts below have held that the act chapter 647 of the Laws of 1873 was a constitutional exercise of legislative power, and that the defendant is liable to pay the one per cent of the gross receipts as therein specified. It is claimed on behalf of the defendant that the act chapter 647 of the Laws of 1873 is unconstitutional, and imposed no obligation upon the Bleecker Street and Fulton Ferry Railroad Company to pay the percentage therein specified.

Section 1 of the act, chapter 140 of the Laws of 1850 (the General Railroad Act), provides that the corporations organized under that act shall be subject to the provisions contained in

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title 3 of chapter 18 of the first part of the Revised Statutes ; and among the provisions therein contained is this : " The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension or repeal in the discretion of the legislature." Section 48 of that act also provides that " the legislature may at any time annul or dissolve any incorporation formed under this act ;" and section 1 of article 8 of the Constitution provides that " Corporations may be formed under *general* laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be obtained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed." Under the power reserved in these acts and the Constitution, the legislature was clothed with authority to require the payment of the percentage specified in the act chapter 647. That act was an exercise of legislative authority, and must be deemed to be an alteration and amendment of the charter of the Bleecker Street and Fulton Ferry Railroad Company. It is difficult to put precise limits upon the power of the legislature thus reserved over corporations created by it or under its authority. Under its reserved power it cannot deprive a corporation of its property, or interfere with, or annul its contracts with third persons. (*People v. O'Brien*, 111 N. Y. 1.) But it may take away its franchise to be a corporation, and may regulate the exercise of its corporate powers. As it has the power utterly to deprive the corporation of its franchise to be a corporation, it may prescribe the conditions and terms upon which it may live and exercise such franchise. It may enlarge or limit its powers, and it may increase or limit its burdens. It is sometimes said that the alteration under such reserved power must, however, be reasonable, and it must always be legislative in its character, and consistent with the scope and objects of the corporation as it was originally constituted. Here, in the first instance, by the act chapter 199 of the Laws of 1873, a license fee of \$50 for each car was

considered a sufficient compensation to the city for the valuable franchise enjoyed by the corporation. But, on further consideration, the legislature concluded that it would be more convenient and beneficial to the city, and a fairer measure of the compensation which it should receive, that a percentage on the gross receipts should be paid. And this change the legislature was competent to make within every authority that can be found in the books. (Morawetz on Corporations, § 1093, *et seq.*; *Tomblinson v. Jessup*, 15 Wall. 454; *Miller v. State*, 15 id. 478; *Farrington v. Tennessee*, 95 U. S. 679; *Sinking Fund Cases*, 99 id. 700; *Railway Company v. Philadelphia*, 101 id. 528; *Close v. Glenwood Cemetery*, 107 id. 466; *Spring Valley, etc., Co. v. Schottler*, 110 id. 347; *Parker v. Metropolitan R. R. Co.*, 105 Mass. 506; *Mayor of Worcester v. Norwich, etc., R. R. Co.*, 109 id. 113; *People ex rel. v. Hills*, 46 Barb. 340; *Schenectady & Saratoga Plank-Road Co. v. Thatcher*, 11 N. Y. 102; *Buffalo & N. Y. City R. R. Co. v. Dudley*, 14 id. 336; *In the Matter of Oliver Lee & Co.'s Bank*, 21 id. 9; *Albany Northern R. R. Co. v. Brownell*, 24 id. 345; *Railroad Co. v. Maine*, 96 U. S. 499.)

We are, therefore, of opinion that the act referred to, requiring the Bleecker Street and Fulton Ferry Railroad Company to pay one per cent of its gross receipts to the city, was constitutional and valid; and if that railroad company had continued to operate its road, an action to recover the percentage could have been maintained by the city against it.

But the further objection is made that this defendant, as the lessee of the Bleecker Street and Fulton Ferry Railroad Company, is not liable to pay the percentage mentioned. There is nothing in the terms of the lease which imposes this obligation upon it. What it is bound to do under the lease is expressly stipulated therein, and there is no stipulation or provision imposing upon it the duty or obligation to pay the percentage. There is nothing in the general laws of the state which imposes this burden upon the defendant as lessee. By chapter 199 of the Laws of 1873, the Bleecker Street and

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Fulton Ferry Railroad Company was authorized to lease its road, or any portion of it; also, by chapter 389 of the Laws of 1875, any railroad company was authorized to take a lease of all or any portion of its railroad. But neither of those acts imposes upon the lessee any express obligation whatever; and we know of no general rule of law by which the defendant, as lessee, became obligated to pay this percentage exacted by the state from its lessor.

We cannot, therefore, find the defendant's obligation to pay this percentage in any particular language used in the lease or in any statute. But we think it may, nevertheless, be found in the essential relations existing between the defendant and the lessor corporation.

The gross receipts mentioned in the act of 1873, were the gross receipts of the Bleecker Street and Fulton Ferry Railroad Company received for fares upon its road. It could have no other receipts, and one per cent of those receipts it was bound to pay to the city of New York—not a sum equal to one per cent, but so much of the gross receipts. Hence it would receive one per cent of all the fares paid to it to and for the use of the city under the obligation to pay it to the city. This was a charter obligation. The entity called a corporation consists of the sum total of all its charter powers and rights, and all its charter obligations and duties; and such powers and rights cannot be effectually divorced from such obligations and duties. The latter are correlatives to the former, and constitute the consideration for the corporate franchises, and their performance may be exacted as a condition of corporate existence. Hence when the defendant took the property, rights, privileges and franchises of the Bleecker Street and Fulton Ferry Railroad Company, it took them burdened with its charter obligations. Taking the place of that company as to its charter powers and rights, it necessarily took its place as to its charter obligations and duties. It could not have and exercise the former without discharging the latter. A *quasi* public corporation without any charter duties is inconceivable; and so it is incon-

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ceivable that anyone could acquire by acts *in pais* the charter rights without at the same time assuming the charter duties. We, therefore, find in the acts authorizing the lease, and in the terms of the lease and the essential character of the lessor corporation, enough to impose upon the defendant the obligation to pay the percentage claimed. When the defendant took the place of the lessor corporation, it became obligated to take and retain one per cent of the fares received by it to and for the use of the city, and to make payment thereof to the city.

The order should be affirmed, with costs.

All concur.

Order affirmed.

HENRIETTA C. SMITH, Appellant, v. JOHN T. CORNELL, as
Executor, etc., Respondent.

Certain lands, of which G. died seized, descended to plaintiff as heir-at-law, subject to an estate for two lives in a trustee, created by the will of G. Taxes had been assessed upon the lands prior to the death of the testator. These were paid out of the proceeds of sales of the land pursuant to judgments in a foreclosure suit and in an action for dower commenced after the death of G. Plaintiff and defendant, the executor and trustee under the will of G., were parties defendant to said actions. In an action to compel defendant to restore to the trust fund, out of the personal estate the amount of the taxes, it appeared that the personal estate amounted to more than the taxes, but that there were claims of unpreferred creditors of the decedent largely exceeding the personalty. *Held*, that, while it was the duty of the executor to pay the taxes before paying the unpreferred debts (3 R. S. 87, § 27), while the proceeds of the sale of the land, as between the heir-at-law and the next of kin or legatees were to be treated as realty, and while the executor, as such, was not vested with administrative authority to sell lands for the payment of debts, yet as, if the executor was required to pay over to himself, as trustee, out of the personalty the amount taken from the real estate to pay taxes, the fund would be liable to be reappropriated on the application of creditors to the payment of general debts, and as, without any action on the part of the executor, the taxes have been paid, the relief asked for was properly denied.

Smith v. Cornell (111 N. Y. 554) distinguished.

Reported below, 20 J. & S. 499.

(Submitted March 21, 1889; decided April 16, 1889.)

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APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made December 7, 1885, which affirmed a judgment in favor of defendant, entered upon a demurrer to the answer.

The complaint in this action alleged, in substance, that the plaintiff is the only child and heir-at-law of Gershom B. Smith, deceased; that said Gershom B. Smith died, leaving a will which was duly proved, and the defendant qualified as executor; that by the will the said Smith devised certain premises owned by him in fee, and known as Nos. 18 and 20 Howard street, in the city of New York, to the defendant Cornell, as executor, in trust, to take charge of and collect the rents and income of such premises during the lifetime of two nephews, and to pay the same over to three nephews, which were named; and upon the further trusts, after the death of the two first named nephews, to convey the premises to certain parties named in the will, if they should then be living; that at the time of the death of the testator, No. 18 Howard street was subject to unpaid taxes, which, with interest, amounted to \$2,615, and No. 20 Howard street was subject to unpaid taxes amounting, with interest, to about \$1,570; that No. 20 Howard street was, at the time of the death, incumbered by two mortgages made by him; that after his death an action was begun for the foreclosure of the mortgages and a judgment of foreclosure and sale rendered, under which the premises were sold, and out of the proceeds of the sale, the amount of unpaid taxes upon the premises were paid in accordance with the directions of the judgment; that there was a surplus of \$1,215 after payment of the taxes, the amount due upon the mortgage, and all other charges, which surplus was paid to the defendant as trustee under the third clause of the will. That the testator left a widow, Ann E. Smith, who became entitled to dower, and brought her action for it; and in that action judgment was rendered, that the premises No. 18 Howard street be, and they were accordingly, sold; and from the proceeds the taxes unpaid upon the premises were

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paid, with interest, in accordance with the directions of the judgment; that after payment of all charges and expenses there was a surplus of \$3,232, which was paid over to the defendant as trustee under the will. That after the sales of both of the premises the plaintiff began an action in which a judgment was duly rendered, declaring that the said trust, so far as it authorized the defendant to collect the rent of the premises, during the lives of the two nephews, was a valid trust in lands, and vested in the defendant an estate in such lands for the joint lives of the two nephews, but that the trust to convey the fee after the termination of said two lives was not a lawful trust and did not vest in the trustee any estate; that upon the death of the testator the fee descended to the plaintiff as sole heir-at-law, subject to the life estate described: and it was further adjudged that such surplus, above referred to, was to be deemed real estate, impressed with the valid trust; and that, subject to the execution of such trust, the principal of said funds was vested in the plaintiff, and should be paid over to her, upon the termination of such life estate, as the owner in fee of the land represented by such funds; that the testator left personal estate to the amount of \$9,000 and upwards, and more than enough to pay said taxes. The complaint asked, as relief, that the defendant, as executor of the will, be adjudged to pay the plaintiff the amount of said taxes and interest, as such preferred claim, out of the personal estate of the deceased, in his hands.

The answer alleged, first, that the admitted claims of the unpreferred creditors against the estate represented by him are largely in excess of the assets received by him as alleged in the complaint, and that defendant has received all the known assets or personal property belonging to the testator at the time of his death. Second, that said surplus funds were paid into the hands of the defendant, pursuant to order of the court, entered in the action of foreclosure and dower alleged in the complaint, on the application of this defendant, and with plaintiff's consent, she being a party to said action, as was also this defendant.

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The plaintiff demurred to this as insufficient in law to constitute a defense.

Benjamin M. Stilwell for appellant. The executor not only administered the personal estate, but, if that was insufficient to pay the debts, he administered the proceeds of the real estate after it had been converted into money by the surrogate. (*Smith v. Cornell*, 51 Super. Ct. [J. & S.] 354.) The allegation in the complaint that "unpaid taxes are a debt of the testator which the executor is required by law to pay out of the personal estate in preference to any debts of less degree" is not a conclusion of law, which the defendant did not admit by not answering, but a statute. (2 R. S. 87, § 27; *Seabury v. Bowen*, 3 Bradf. Sur. 207; *Griswold v. Griswold*, 4 id. 216.) The real estate or its proceeds can only be reached and applied to the payment of debts under a decree of the surrogate made upon petition under the Code. (Code Civ. Pro. §§ 1843-1849, 2750, 2755, 2763.)

Horace Secor, Jr., for respondent. A court of law will endeavor to prevent circuitry and multiplicity of suits where the circumstances of the litigant parties are such that, on changing their relative positions of plaintiff and defendant, the recovery by each would be equal in amount. (Broom's Leg. Max. 343.)

ANDREWS, J. There is no doubt that it is the duty of an executor, in the ordinary course of administration, to pay taxes assessed against the lands of his testator prior to his death, before paying the other debts of the decedent, except debts entitled to a preference under the laws of the United States. (2 R. S. 87, § 27.) The taxes in question in this case were not paid by the executor, but were paid out of the proceeds of the sale of the lands of the testator, pursuant to the judgments in the foreclosure action and in the action for dower, in suits commenced after his death. The direction in the judgments, that the taxes should be paid out of the proceeds of the sales, was in accordance with law. (Code, § 1676.) The plaintiff and the executor were made parties

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defendant in both actions. This action is, in substance, an action to compel the executor to restore to the trust fund, out of the personal property which came to him as executor, an amount equal to the taxes paid out of the proceeds of the sale of the lands under the judgments mentioned. The personal estate of the testator amounted to more than the taxes. It has been adjudged in a prior action that the trust created by the will of the testator in his lands was valid to support the equitable life estate in the income during the lives of Thomas and Benjamin Oliphant, but that the ulterior limitation was void, and that the lands descended to the plaintiff as heir-at-law of the testator, on his death, subject to the estate in the trustee for the two lives mentioned. If there was nothing else in the case, it would seem that the plaintiff would be entitled to have the sum taken from the land to pay taxes restored to the trust fund. The proceeds from the sale of the land are to be treated as land, as between the heir-at-law and the next of kin or legatees of the testator. But the answer alleges, and the demurrer concedes, that the admitted claims of unpreferred creditors of the estate largely exceed the personal assets of the testator. If, therefore, the executor is required to pay over to himself, as trustee, out of the personal assets, the amount taken from the real estate to pay taxes, the replenished fund into which the real estate has been converted would be liable to be reappropriated, on the application of creditors, to the payment of the general debts of the testator. The statute prescribes special proceedings for the sale of the real estate of a decedent for the payment of debts, and an executor, as such only, and by virtue of his general powers, is not vested with administrative authority to sell lands for this purpose. (*Smith v. Cornell*, 111 N. Y. 554.) But without any action on his part the taxes have been paid out of land embraced in the trust. The question is, ought the amount paid to be restored for the benefit of the beneficiaries in the trust and the remainderman? Upon the facts admitted we think the relief was properly denied. This result prevents

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circuity of action and subjects the trust fund to no charge except that to which in some form it would sooner or later be liable. The possibility that, by failure of creditors to pursue their legal remedies, the fund would be exonerated is too remote to be considered, and, moreover, it is a consideration which does not commend itself to a court of equity. The conclusion reached does not conflict with *Smith v. Cornell* (*supra*), which was plainly well decided. That case involved the simple question whether a purchase by the heir-at-law of lands of the testator on a sale under a decree in an action for dower brought by the testator's widow where the sale and the conveyance were made subject to unpaid taxes assessed during the testator's lifetime precluded the heir-at-law, to whom the lands descended subject to a trust for lives from calling upon the executor to pay the taxes out of the personal estate of the testator, no special circumstances being shown to take the case out of the general rule.

We think the judgment in the present case is right and it should, therefore, be affirmed.

All concur.

Judgment affirmed.

JENNIE M. THOMPSON et al., as Executors, etc., Appellants, v.
THE ST. NICHOLAS NATIONAL BANK, Respondent.

In an action to recover possession of certain railroad bonds which the complaint alleged were the property of plaintiff and of which defendant had become wrongfully and illegally possessed, these facts appeared: T., the original plaintiff, transferred to C. & M., stock brokers, the bonds in question, to be held as margins on his stock transactions. C. & M. deposited them with defendant, a national bank, as security for any indebtedness, present or future, by them to defendant, with authority to sell at public or private sale, without notice, and apply the proceeds in payment of such indebtedness, and on the faith of such deposit defendant promised to pay the checks of C. & M. to a specified amount; simultaneously therewith it certified checks to that amount and on the same day paid them to the holders thereof. On the next business day C. & M. failed, owing defendant a balance of account. Thereafter T. served

113	325
127	359
113	325
130	328
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130	125
113	325
141	328

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written notice upon defendant to the effect that the bonds were his property, forbidding its parting with the same except by his order, and demanding an account showing what lien plaintiff claimed to have thereon; this defendant did not furnish. No offer to pay such balance or request to redeem the bonds, or admission of any rights of defendant therein was made by T. Defendant subsequently sold the bonds, realizing less than the balance unpaid. *Held*, that a verdict was properly directed for defendant; that plaintiffs, to maintain the action, were bound to show that no title passed to defendant by the transfer to it, or that at some time prior to the commencement of the action they had become entitled to the possession; that the bank acquired a valid title, and plaintiffs failed to show a right of possession, as they could only establish such a right by proof that the debt for which the bonds were pledged had been wholly paid, or that tender had been made of a sufficient sum to discharge it. Plaintiff claimed that the certification of the checks without an equivalent amount of money on deposit, being in violation of the National Banking Act (U. S. R. S. § 5208), no valid debt was created thereby, and so defendant did not become a *bona fide* holder of the bonds. *Held*, untenable; *first*, that the act fixes and limits the penalty for its violation, and instead of invalidating, expressly affirms the validity of the certification; *second*, that the provision had no application to the question, as the contract of the bank with C. & M. was simply to protect the checks of the firm, *i. e.*, to loan the amount specified and pay it out on its check, not to certify them; that this contract was lawful and its legality was not affected by the certification. Also, *held*, the application by defendant of deposits made by C. & M. on the day the agreement was made to the payment of the prior indebtedness of the firm, instead of to the indebtedness created by the payment of the certified checks, was proper. In the absence of express application of payments by the parties, the law applies them to the earliest items of the account. *Mem. of decision below*, 47 Hun, 621.

(Argued March 21, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 8, 1888, which denied a motion for a new trial and directed judgment for defendant on a verdict.

This action was brought to recover possession of certain railroad bonds.

The material facts are stated in the opinion.

Lewis Sanders for appellants. If a person, when goods are demanded of him, rests his refusal on grounds quite

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distinct from any claim of lien, he cannot afterwards put forth a claim of lien as his justification for his refusal. (1 Addison on Torts, 540; *Dous v. Morewood*, 10 Barb. 187; *Dirks v. Richards*, 4 Man. & G. 554; *Weeks v. Goode*, 6 C. B. [N. S.] 369; *Altersol v. Jester*, 13 Ark. 537.) The money being paid in by Capron & Merriam, and credited by the bank to the general account of Capron & Merriam, under the doctrine of appropriation of payments, the law will, in the absence of applications by either debtor or creditor, apply the money in discharge of and relief of the surety, Mr. Thompson, whose bonds were held as collateral for these certifications. (*Smith v. Lloyd*, 11 Leigh [Va.] 517; *Terhune v. Colton*, 12 N. J. Eq. 238; 2 Daniels Neg. Inst. [2d ed.] 256; *U. S. v. Bradbury*, 2 Ware, 149; *Hill v. Braxton*, 1 Washington [Va.] 133; *Bussey v. Gant, Admr.*, 10 Humph. 241; *Moore v. Ryder*, 65 N. Y. 441.) Plaintiff can be holden only to extent of actual advances made on the faith of bonds in suit. (*Gould v. F. L. & T. Co.*, 23 Hun, 322; *Hazard v. Fiske*, 83 N. Y. 298.) The burden of proving a purchase in good faith and for value devolved upon the defendant after it was established that the notes had been surreptitiously put in circulation and diverted from the purpose for which they had been delivered to Winslow. (*D. S. Machine Co. v. Best*, 105 N. Y. 64; *Weaver v. Barden*, 49 id. 290; *Stevens v. Brennan*, 79 id. 258; *Howland v. Woodruff*, 60 id. 79; *Dusenbery v. Hulbert*, 59 id. 546.) Defendant did not acquire the bonds in the ordinary course of business. (U. S. R. S. § 5208; 22 U. S. Stat. at Large, Laws 1882, chap. 290, 166, § 13; *Felt v. Heye*, 23 How. Pr. 361, 362; 1 Daniel on Neg. Inst. [2d ed.] 625, 626, §§ 781, 781 a, 787; 11 id. §§ 1500-1502; *Roberts v. Stall*, 37 Conn. 205; *Bank of Rome v. Village of Rome*, 19 N. Y. 24; *Everton v. Nat. Bk. of Newport*, 66 id. 22; *Tallmadge v. Pell*, 7 id. 346; *Dewitt v. Brisbane*, 16 id. 514; *Leavitt v. Palmer*, 3 id. 19.) The prohibition against national banks loaning on the security of their stock has been sought to be evaded in many forms, but always without success. (U. S. R. S. § 5201; *Bank v. Lanier*, 11 Wall. 374;

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Conklin v. Nat. Bk., 45 N. Y. 655.) A contract made in violation of a statute is void, and it is immaterial that it is not so declared in the statute itself. (*Crocker v. Whitney*, 71 N. Y. 170; *Pennington v. Townsend*, 7 Wend. 280, 281; *Hallett v. Novian*, 14 Johns. 273, 290; *Thalimer v. Brinkerhoff*, 20 id. 397; *Bank v. Owens*, 2 Peters, 538; *Griffith v. Wells*, 3 Denio, 226; Story on Con. §§ 613, 614; *Barton v. P. J. & U. F. P. R. Co.*, 17 Barb. 404; *Ferndon v. Cunningham*, 20 How. 154; *Best v. Bender*, 29 id. 489; *Swords v. Owen*, 43 id. 185.) The manufacture of the locks or contract to sell them to the Seal Lock Company, were not acts immoral in themselves or forbidden by any statute, neither *mala in sese* nor *mala prohibita*, so as to make the contract illegal and incapable of being the foundation of an action. (*Earl of Shrewsbury v. N. S. R. Co.*, L. R., 1 Eq. 593; *Taylor v. C. & M. R. Co.*, L. R., 2 Exch. 356; *Bissell v. M. C. R. Co.*, 22 N. Y. 258; *Whitney Arms Co. v. Barlow*, 63 id. 68, 69; *Bissell v. M. S. & N. I. R. R. Co.*, 22 id. 269, 270, 273; *Tracy v. Talmadge*, 14 id. 191; *Penn Co. v. S. L. & A. R. R. Co.*, 118 U. S. 317; *Thomas v. R. R. Co.*, 101 id. 86.) A demand having been made before the sale, after the sale no demand was necessary. (*People v. Bank*, 75 N. Y. 564; *Trow v. Shannon*, 78 id. 453.) The burden of proof is on the holder of negotiable paper negotiated in fraud of rights of the owner to show that he acquired it in good faith and for value. (*Wilson v. Locke*, 58 N. Y. 642; *First Nat. Bk. v. Green*, 45 id. 301; *Nickerson v. Ruger*, 76 id. 282.) Defendant was not subrogated to the rights of Capron & Merriam. (*Felt v. Heye*, 23 How. 361; *Black v. Bogart*, 65 N. Y. 601; *Chapman v. Brooks*, 31 id. 75.)

William Allen Butler for respondent. A holder for value of bonds like those in suit is unaffected by want of title in the party from whom he takes them, unless he acts in bad faith; and the burden of proof on the question of bad faith is on the party who assails the possession. (*Murray v. Lardner*, 2 Wall. 110, 121; *Welch v. Sage*, 47 N. Y. 143; *Thompson v.*

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St. Nicholas Bk., 9 N. Y. S. R. 363.) A national bank may take personal security for future advances. (*Nat. Bk. v. Whitney*, 103 U. S. 99.) As section 5208 of the United States Revised Statutes does not declare void a contract to secure a debt arising from the certifications prohibited by its terms, the illegality of this contract cannot be maintained. (*Royal British Bk. v. Turquand*, 6 Ellis & B. 325; *Comrs of Knox Co. v. Aspinwall*, 21 How. [U. S.] 539; *Stoney v. Am. Life Ins. Co.*, 11 Paige, 635; *Bk. of Ashland v. Jones*, 61 Ohio St. 145; *Bridgewater & U. P. R. Co. v. Robbins*, 22 Barb. 662, 667; *Vernon Cheese Co. v. Murtaugh*, 50 N. Y. 314; *Bonnell v. Griswold*, 80 id. 128; *Benton v. Wickwire*, 54 id. 226, 228.) The statute being highly penal, cannot be enlarged by construction or implication, or its penalty imposed except as the plain language of the section requires it. (*Whitaker v. Masterton*, 106 N. Y. 277, 280.) Where the provisions of the national banking statutes prohibit certain acts by banks, or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the government, and cannot be availed of by private parties. (*Nat. Bk. of Xenia v. Stewart*, 107 U. S. 676; *Gold Mining Co. v. Nat. Bk.*, 96 id. 640; *Nat. Bk. v. Whitney*, 103 id. 99; *Reynolds v. Crawfordsville Nat. Bk.*, 112 id. 405; *Fortier v. N. O. Bk.*, Id. 439, 451.) Where acts, otherwise lawful, are prohibited by statute to corporations, private parties cannot avail of the prohibition to invalidate transactions which contravene the statute. The prohibition and prescribed penalty may render the corporation amenable to the state, but a private party cannot take advantage of them. (*Atlantic State Bk. v. Savery*, 82 N. Y. 291; *Jones v. G. & I. Co.*, 101 U. S. 622, 629; *Nat. Bk. v. Whitney*, 103 id. 99.) In replevin or trover the plaintiff must show possession in himself or an existing right to take immediate, actual possession of the property. (*Clements v. Yturria*, 81 N. Y. 285, 290; *Hull v. Carnley*, 11 id. 501; *Bradley v.*

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Copley, 1 C. B. 685; *Talty v. F. S. & T. Co.*, 93 U. S. 321, 325; *Bakeman v. Pooler*, 15 Wend. 637.) The cases in which the plaintiff has been permitted to recover in part, or to redeem securities wrongfully pledged, were not, as here, replevin based on an alleged original wrongful detention. (*Hazard v. Fiske*, 83 N. Y. 287, 299; *McNeil v. Tenth Nat. Bk.*, 46 id. 325; *Gould v. F. L. & T. Co.*, 23 Hun, 322.)

RUGER, Ch. J. The uncontroverted proof on the trial established the following facts, viz.: That on the 18th day of April, 1874, Capron & Merriam, stock brokers in New York, deposited with the defendant, a national bank, ninety-three coupon railroad bonds, payable to bearer, of the par value of \$1,000 each, as security for any indebtedness which they then were, or might become liable for to such bank, with authority to sell such securities upon default, either at public or private sale, without advertisement or notice, and apply the proceeds in payment of such indebtedness. Upon the same day, and upon the faith of such deposit, the defendant promised to pay Capron & Merriam's checks in favor of third parties, to the amount of upwards of \$236,000, and simultaneously certified checks to that amount, which were presented by and paid to the holders thereof by it during the same day. On Monday, the 20th of April, 1874, Capron & Merriam failed, owing the defendant a balance of account of about \$72,000, arising out of the transactions of the 18th of April, 1874. This sum was made up by charging Capron & Merriam with the amount of the checks certified and paid on the eighteenth of April; certain other checks paid through the Clearing House on the morning of that day, and a balance of account remaining unpaid upon the transactions of the preceding day, and deducting therefrom the amount of their deposits, being about \$211,000, made on April eighteenth. On the 5th of May, 1874, the plaintiff's testator served a written notice upon the defendant to the effect that the bonds in question were his property, and forbidding them from parting with the same, except by his order, and demanding an account showing what

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lien the defendant claimed to have on the bonds. Upon the trial the plaintiffs proved that their testator, previous to April 18, 1874, owned such bonds, and on that day and the day previous, transferred them to Capron & Merriam to be held as margins on his individual stock transactions.

No payment upon the indebtedness of Capron & Merriam to the defendant was ever made, except some small sums received by way of interest, and the receipts from sales of the bonds in question, and others held as security for it. Such receipts never amounted to the sum of the indebtedness. No offer to pay such indebtedness was ever made by the plaintiffs' testator, or request to redeem the bonds in suit, or admission of any right in the bonds by the defendant. The defendant never, in terms, refused to render an account of its transactions with Capron & Merriam to the plaintiffs' testator, but it did omit to send a written statement thereof in response to his notice requiring the same. The defendant subsequently sold all of the securities held by it, either at public or private sale, using its best efforts to obtain as large a price as possible for them, and realized less than the amount of the debt due to it from Capron & Merriam. The plaintiffs' testator, in October, 1879, claiming to be the owner of the bonds, demanded of the defendant their unconditional delivery to him, and in April, 1880, brought this action to recover their possession. Each party, on the close of the evidence, requested the direction by the court of a verdict, and the court granted the request of the defendant and ordered a verdict for it. To this direction the plaintiffs excepted.

The plaintiffs also asked to go to the jury, in case the court should refuse to direct a verdict for them, upon certain grounds stated, upon the fact whether the defendant was not liable for the full value of forty-eight certain bonds "which they sold without notice to plaintiffs' intestate, and he is entitled to have applied on the bank's account the highest market-price which they would realize in extinguishment of the bank's claim, leaving the rest of the securities free and clear." This was refused and the plaintiffs excepted. The court ordered

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the exceptions to be heard in the first instance at the General Term.

There were some exceptions to the admission or rejection of evidence by the court, taken by the plaintiffs during the trial; but none are referred to in the appellants' brief on the argument before us, and they were all unimportant. Neither has the exception to the refusal of the court to permit the plaintiffs to go to the jury, on the alleged question of fact, been argued or presented on the appeal. The refusal of the court was so obviously proper that it is unnecessary to spend time in discussing it.

It thus appears that the only exception in the case is to the direction of the court requiring the jury to find for the defendant. This exception presents the question whether, upon all of the facts of the case, the plaintiffs had established a right to demand the surrender of such bonds, or any part thereof, by the defendant to their testator. We think there was no error in the disposition made of the case by the trial court. The complaint alleges the ownership of the bonds by the plaintiffs; that on or about the 18th day of April, 1874, the defendant became wrongfully and illegally possessed of the same; that upon demand it had refused to deliver them up to plaintiffs, and a demand of judgment for the return of the bonds, and in case that could not be had a judgment for their value. The answer denied all of the allegations of the complaint except its own incorporation and a demand of the bonds by the plaintiffs, and for a second defense alleged the transfer of said bonds to it by Capron & Merriam as security for certain loans and demands made to and for said Capron & Merriam; the non-payment of the debt for which they were pledged, and a sale of such securities pursuant to the agreement under which they were pledged. The issue in the case was thus a plain one. The plaintiffs claimed to be the absolute owners of the bonds unaffected by any right which the defendant might assert in respect to them; and to maintain the action they were bound to show that no title passed to the defendant by their transfer, or that at some time prior

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to the commencement of the action they had become entitled to the possession of such bonds, or some part thereof. (*Duncan v. Brennan*, 83 N. Y. 487; *Clements v. Yturria*, 81 id. 285; *Redman v. Hendricks*, 1 Sandf. 32; *Ingraham v. Hammond*, 1 Hill, 353; *Pattison v. Adams*, 7 id. 126.) Assuming the validity of the transaction by which the defendant became possessed of the bonds, this could be effected only by proof that the debt for which they were pledged had been wholly paid, or the tender of a sufficient sum to discharge such debt. (*Lewis v. Mott*, 36 N. Y. 395; *Bakeman v. Pooler*, 15 Wend. 637; *Talty v. Freedman's Sav. Bk.*, 93 U. S. 321.) This, confessedly, the plaintiffs did not show. Various alleged equitable claims have been presented by the appellants as affecting the determination of this appeal; but, admitting their existence, the form of the action does not permit their consideration here. The action was replevin *in cepit* and predicated upon the alleged wrongful taking by the defendant of the bonds in question from Capron & Merriam. The application of the deposits of the eighteenth day of April to the extinguishment of the unpaid balance of account existing against Capron & Merriam on the morning of that day, instead of the indebtedness created by the payment of the certified checks, was properly made and could not be questioned by the plaintiffs. The demand upon which they were applied was a running account comprised of a number of items accruing at different times, all equally secured by the collaterals held by the defendant, but which were always insufficient to satisfy the whole debt. Under such circumstances, in the absence of any express application of payments by the parties, the law applies them to the earliest items of the account. (*Truscott v. King*, 6 N. Y. 147; *Harding v. Tift*, 75 id. 461; *Webb v. Dickinson*, 11 Wend. 62; *United States v. Kirkpatrick*, 9 Wheaton, 720; *Munger on Payments*, 102.)

The main contention of the appellants is, that the transaction by which the defendant certified checks for Capron & Merriam, without having an equivalent amount of money on deposit to meet them, was a violation of section 5208 of the

United States Revised Statutes, and that no valid debt against Capron & Merriam was created thereby; or, in other words, that the defendant did not become a *bona fide* holder of such bonds by reason of payments made in pursuance of such alleged illegal and prohibited arrangement. The statute is as follows: "It shall be unlawful for any officer, clerk or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association at the time such check is certified an amount of money equal to the amount specified in such check. Any check so certified by duly authorized officers shall be a good and valid obligation against the association, but the act of any officer, clerk or agent of any association in violation of this section shall subject such bank to the liabilities and proceedings on the part of the comptroller as provided for in section fifty-two hundred and thirty-four."

It will be seen that the statute affirms the legality of the contract of certification, and expressly prescribes the consequences which shall follow its violation. It, therefore, appears that, so far from making the contract of certification void and illegal, its validity is expressly affirmed, and the consequences which follow a violation are specially defined, and impliedly limit the penalty incurred to a forfeiture of the bank's charter and the winding up of its affairs. There is a clear implication from this provision that no other consequences are intended to follow a violation of the statute. It would, indeed, defeat the very policy of an act intended to promote the security and strength of the national banking system, if its provisions should be so construed as to inflict a loss upon them, and a consequent impairment of their financial responsibility.

The decisions of the Supreme Court of the United States are uniform in giving this construction to the provisions of the national banking act. (*Nat. Bk. of Xenia v. Stewart*, 107 U. S. 676; *Nat. Bk. v. Matthews*, 98 id. 621; *Nat. Bk. v. Whitney*, 103 id. 99.) The principle decided in *National Bank of Xenia v. Stewart* seems to be in point. There the bank made a loan upon the security of shares of its own stock,

which loan was prohibited by section 5201 of the United States statutes. After the debt became due the bank sold the shares and applied their proceeds to the payment of the debt. The administrators of the debtor sued to recover the proceeds of the sale, and it was held that they could not recover, as the contract had been executed.

In *National Bank v. Matthews*, the court held that a mortgage on real estate taken to secure an existing indebtedness and for future advances, was a valid security in the hands of the bank, although, by sections 5136 and 5137 of the Revised Statutes of the United States, its was impliedly prohibited from taking such securities. It was held that the government alone was entitled to prosecute for the offense committed by the bank in taking a prohibited security, Justice SWAYNE saying: "The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by congress." The same principle was held by this court in the *Atlantic State Bank v. Savery* (82 N. Y. 291). But we are further of the opinion that the section has no application to the question here, which concerns the relations between Capron & Merriam and the defendant alone. By the deposit in question Capron & Merriam secured the promise of the bank to protect their checks of a certain day for a specified amount. The certification of these checks was entirely aside from this agreement; that was a contract between the bank and the anticipated holders of the checks; Capron & Merriam had received the consideration for their pledge when the bank agreed with them to honor their checks. This would have been equally effectual between these parties without any certification. That act was simply a promise to such persons as might receive the checks that they should be paid on presentation to the bank in accordance with the previous agreement with Capron & Merriam. The legal effect of the agreement was that the bank should loan a certain amount to Capron & Merriam, and pay it out on their checks to the persons holding them. It was entirely lawful for the bank to contract to pay Capron & Merriam's checks, and it

did not affect the legality of that transaction that they also represented to third parties that they had made such an agreement and would pay such checks. Capron & Merriam cannot dispute their liability for the amount paid out in pursuance of such an agreement, and neither can any other party standing in the shoes of the bank depositor. The fact that the bank, in connection with an agreement to pay such checks, had also promised third parties to pay them, could not invalidate the liability previously incurred, or impair the security which had previously been given to it upon a valid consideration. The fact of the certification was entirely immaterial in respect to the liability incurred by Capron & Merriam to the bank.

We have been unable to discover any evidence in the case impairing the title to the bonds acquired by the bank through their transfer by Capron & Merriam to it. The purpose for which they were transferred by Thompson contemplated their transfer and sale by Capron & Merriam to third persons, and the bank acquired a valid title to them by such transfer. The evidence showed that the transaction between Capron & Merriam and the bank was in the ordinary course of business pursued by the bank, and that it received the bonds in good faith for a valuable consideration. Within all authorities this gave it good title to such securities. (*Welch v. Sage*, 47 N. Y. 143; *Murray v. Lardner*, 2 Wall. 110; *Davis Sewing Machine v. Best*, 105 N. Y. 59.)

The bank having acquired a valid title to the bonds, was authorized to deal with them for the purpose of effecting the object for which they were transferred by Capron & Merriam. (*Talty v. Freedman's Savings and Trust Co.*, 93 U. S. 321.) Its right to hold the bonds continued so long as any part of the debt against Capron & Merriam remained unpaid. The plaintiff's intestate could, undoubtedly, at any time, have established his equitable right to a return of the bonds and procured their surrender by paying the amount for which they were pledged, but this he not only refrained from doing, but impliedly denied any right in the defendant by demanding

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the unconditional surrender of the bonds. This he never became entitled to and, of course, is not authorized to recover their possession in this action.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

JAMES CRUIKSHANK, as Executor, etc., Appellant and Respondent, v. THE HOME FOR THE FRIENDLESS et al., Respondents; JULIA A. CHASE, Appellant.

The will of D., and a codicil thereto, gave his residuary estate to his executors in trust, to apply it, or the proceeds of sale, which they were empowered to make, to the establishment and endowment of a charitable institution, whose object and the class of persons to be relieved and benefited thereby should be the same as a charitable institution named. The executors were authorized and directed to apply for and obtain from the state legislature, "as early as practicable," an act of incorporation of such an institution, and to do this, if possible, within ten years after his decease. In the event that the gift "should be adjudged or proved invalid or its execution be impossible, either by judicial decision or from any other cause," the testator directed that all his residuary estate should be sold and the proceeds equally divided among certain existing religious and charitable corporations named, all of whom had capacity to take. In an action for the construction of the will, *held*, that the primary gift was invalid, as there was contemplated a period measured by years, not by lives, during which there would be no person in existence by whom an absolute estate in possession could be conveyed, and so there was an unlawful suspension of the power of alienation; also, that the gift was not saved by the fact that an institution, such as contemplated by the testator, could have been incorporated under the general law, as such a corporation was not intended or directed, but one formed under a special charter; also, that if the will should be construed as working an equitable conversion of the real estate into personalty this would not affect the question, because considering it as personalty, the prohibition of the statute against a suspension of the absolute ownership of personal property for more than two lives would apply.

Shipman v. Rollins (98 N. Y. 511); *Burrill v. Boardman* (43 id. 254) distinguished.

113	337
113	510
113	524
113	337
126	237
126	306
127	541
113	337
141	34
113	337
151	249
113	337
152	485
113	337
161	137

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But, *held*, that the alternative and substituted gifts were valid; and that they took effect and the property vested in the beneficiaries named at the death of the testator.

By the codicil the testator gave to a sister, E., two lots of land. She died during his lifetime. *Held*, that the lapsed devise went into the residue. The common-law rule that lapsed devises do not fall into the residue, but go to the heirs as undisposed of by the will, was done away with by the Revised Statutes (2 R. S. 57, § 5), and there is now no difference between lapsed devises and lapsed legacies, as it respects the operation upon them of a general residuary clause.

Also, *held*, that, as in the event which has happened, of the vesting of the residue in the corporations named, there was an imperative direction for the conversion of the real estate into money, and a gift of the proceeds, rents and profits went with the residue to the legatees.

(Argued March 22, 1889; decided April 16, 1889.)

CROSS-APPEALS from portions of judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 9, 1887, which affirmed a judgment, entered upon a decision of the court on trial at Special Term.

This action was brought to obtain a judicial construction of the will, and a codicil thereto, of John F. Delaplaine, deceased.

The testator died seized and possessed of a large amount of real and personal property. The will gave various devises and legacies, among them legacies to nine incorporated charitable institutions named. The residuary clause was as follows :

"*Eleventhly*. Whereas, I am unmarried and have no direct heirs to my estate other than my said two nieces, brother and sisters, for whom I entertain a sincere affection, but who possess ample wealth and whose happiness would not, in my opinion, be increased by their receiving more than I have already given to them, I, therefore, decide to follow the impulses of my own heart, and to make such disposition of the remainder of my property as my sense of duty and desire of usefulness both urge and induce me. Accordingly, I hereby give, devise and bequeath to my executors hereinafter named, all the rest, residue and remainder of my estate, both real and personal, in trust, nevertheless to apply and dispose of the

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same in the manner and for the purposes hereinafter expressed and set forth. I direct, authorize and require them to apply and employ such estate, both real and personal, or the proceeds arising from the sale of all or any part of the same (which I hereby empower them to make at such time or times as they shall deem expedient or advantageous) to the establishment, support and endowment of a charitable institution to be located in the city of New York, to be styled or named "The Delaplaine Institute for the Relief of the Friendless." My desire is, that the object of the same and the class of persons to be relieved and benefited thereby should be similar to the object and to the recipients of the charity of the institution in the city of New York, now known as the Home for the Friendless, my wish being to make it similarly useful. I authorize and direct my executors to apply for and obtain from the legislature of the state of New York, as early as practicable, an act of incorporation of the same, and I also fully authorize and empower them to make all such by-laws and ordinances relating to the management and government of the same, and further to do and perform all such acts and deeds as shall, in their judgment and discretion, most promote and effect my benevolent and charitable intentions. It is, moreover, my will and desire that in the event that this bequest and devise of my residuary estate should be adjudged or prove invalid, or its execution be impossible, either by judicial decision or from any other cause, that then all the real and personal estate bequeathed and devised thereunder shall be sold and the proceeds of such sale shall be equally divided and paid over to the nine charitable and religious institutions mentioned in the ninth and tenth clauses of this my will, also the American Bible Society and the American Missionary Association."

By the codicil the testator devised to a sister, who died before the testator, two lots described. It also contained this clause :

"*Seventhly.* In order to obviate, as far as I may be able, any chance or possibility that the devise to my executors in trust of my residuary estate for the establishment and endow-

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ment of an institute for the relief of the friendless be delayed or defeated by reason of any uncertainty or limitation therein expressed, or any legal defect therein, although it is my belief and intention to have effectually guarded against such event by my having invested my said executors with absolute power to do and perform all such acts and deeds as shall, in their judgment and discretion, most promote and effect my intention, I now further recommend and direct my executors to apply for and to obtain, if possible, the act of incorporation as in my will mentioned before the expiration of ten years after my decease, while I repeat my desire that they endeavor to obtain it as early as practicable; and I further hereby authorize and empower them if they or their counsel in the law shall deem it to be expedient or requisite to make an application to the Supreme Court of the state of New York for such order or orders in the matter, as shall enable them to perform and carry out my intentions by so amending the form or expression of such devise as far as may be necessary to prevent it from being inconsistent with any law or statute of said state, and in that case I hereby authorize them to perform and execute such order or orders, which, as far as necessary to secure and establish the validity of said devise, I hereby accept and assume as a modification and qualification of said devise as though the same were herein fully expressed."

Further facts are stated in the opinion.

Michael H. Cardozo for plaintiff, appellant. The cardinal rule for the guidance of courts in construing a will is to give effect to the intention of the testator, if such intention may, consistently with legal principles, be carried out. (*Inglis v. Trustees of Sailors' Snug Harbor*, 3 Pet. 99, 146; *Taggart v. Murray*, 53 N. Y. 233; *McCartee v. Orphan Asylum*, 9 Cow. 437, 442; *Vidal v. Girard*, 2 How. [U. S.] 127, 173.) Charitable bequests are to receive a much more favorable construction for upholding the gifts than any other species of trusts or provisions in wills. (2 Shelford, 518, 519; 2 Story's Eq. Jur. §§ 1165, 1174, and notes; Perry on Trusts, 629, 630;

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Sanderson v. White, 18 Pick. 333; *Ould v. Washington Hospital*, 95 U. S. 303, 313; 3 R. S. [Banks' 7th ed.] 1702, 2288; *Attorney-General v. Downing*, Wilmot's Notes of Opinions and Judgments, 18.) The gift by the testator of his residuary estate to his executors to be applied by them to the establishment, support and endowment of a "charitable institution to be located in the city of New York, to be styed or named 'The Delaplaine Institute for the Relief of the Friendless,'" is valid. (*Robert v. Corning*, 89 N. Y. 225, 238; 23 Hun, 299; *Stewart v. Hamilton*, 37 id. 19; Laws 1849, chap. 244; 1 Jar. on Wills [5th ed.] 216; *Burrill v. Boardman*, 43 N. Y. 254, 260.) Where a testator's intention cannot operate to its full extent it shall take effect as far as possible. (2 Jar. on Wills [5th ed.] 709; Finch, 139; 4 Ves. 325.) The short period of time that would have elapsed between the time of the death of the testator and the incorporation of this institution would have been by operation of law, and not through any defect in the will of the testator, and would not create any legal suspension. (*Manice v. Manice*, 43 N. Y. 303, 365; *Shipman v. Rollins*, 98 id. 311, 328; *De Costa v. De Pao*, Ambler, 228.) A trust of personalty is not within the statute of uses and trusts of this state, and may be created for any purpose not forbidden by law. (*Gilman v. McArdle*, 99 N. Y. 451; *Jones v. Habersham*, 107 U. S. 174; *Russell v. Allerton*, id. 163; *Kain v. Gibboney*, 101 id. 362; *Ould v. Washington Hospital*, 95 id. 303; *Fountain v. Ravenel*, 17 How. [U. S.] 370; *Inglis v. Trustees of Sailors' Snug Harbor*, 3 Pet. 99; *Vidal v. Girard*, 2 How. [U. S.] 127; *Minot v. Baker*, 38 Alb. L. J. 152; *Colt v. Comstock*, 51 Conn. 352; *Souers v. Cyrenius*, 39 Ohio St. 29; *Sanderson v. White*, 18 Pick. 328, 336; *Odell v. Odell*, 10 Allen, 1; *Attorney-General v. Downing*, 1 Dick. 414; Ambler, 560; *Attorney-General v. Bowyer*, 3 Ves. 714; 5 id. 300; 8 id. 256; *Chamberlayne v. Brockett*, L. R., 8 Ch. App. Cas. 206.) The testator's gift of the residuary estate to his executors, to be divided by them among the charitable or benevolent institutions, is valid in the event of the

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primary gift to charity being declared invalid. (*Wilkinson v. Adam*, 1 V. & B. 432, 466; *Fulham v. Wickett*, Willis, 303, 309; *Chapman v. Brown*, 3 Burr. 1626, 1634; *Rose v. Rose*, 4 Abb. Ct. App. Dec. 108; *Morgan v. Master-ton*, 4 Sandf. 442, 449.) If the purposes of the will can only be efficiently carried out upon the theory of a conversion, the power to sell in the one case being absolute, and, in the other, being mandatory, the conversion exists. (*Hobson v. Hale*, 95 N. Y. 588; *Lent v. Howard*, 89 id. 169; *Powers v. Cassidy*, 79 id. 602; 64 How. Pr. 19; *Moncrief v. Ross*, 50 N. Y. 431; *White v. Howard*, 46 id. 144; *Phelps v. Pond*, 23 id. 69; *Stagg v. Jackson*, 1 id. 206, 212.) The power of sale operates as an immediate conversion of the real estate into personalty, and, as there is an absolute gift of the proceeds, the intermediate rents and profits go with and are to be deemed a part of the converted fund. (*Lent v. Howard*, 89 N. Y. 169, 176; *Moncrief v. Ross*, 50 id. 431; *Stagg v. Jackson*, 1 id. 206; *Phelps v. Pond*, 23 id. 69, 82; *Bective v. Hodgson*, 10 H. of L. Cas. 656, 665; *Saunders v. Vautier*, 4 Beav. 115; *Gibson v. Lord Montfort*, 1 Ves. Sr. 485; *Josselyn v. Josselyn*, 9 Sim. 63; *Genery v. Fitzgerald*, Jacob's Rep. 468.) The devise to the testator's sister, Emily Louisa Fuller, in the second clause of the codicil, lapsed, and became part of the residuary estate, and is to be disposed of under the provisions of the eleventh clause of said will. (*Earl v. Grim*, 1 Johns. Ch. 194; *Youngs v. Youngs*, 45 N. Y. 254, 257; *Floyd v. Barker*, 1 Paige, 480; *Gill v. Brouwer*, 37 N. Y. 549; *King v. Woodhull*, 3 Edw. Ch. 79; *Barnes v. Huson*, 60 Barb. 598; *Van Beuren v. Dash*, 30 N. Y. 393; *Hart v. Marks*, 4 Bradf. 161; *King v. Strong*, 9 Paige, 93; 2 Redf. on Wills [4th ed.] 115.) As these legacies are, by express terms, payable within one year, the legatees are entitled to interest, to be computed from the expiration of one year after the death of the testator. (3 R. S. [Banks' 7th ed.] 2300, 2301.)

Lucien B. Chase for Julia A. Chase, appellant. In construing this will the laws of New York state will govern.

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(*Russell v. Allen*, 107 U. S. 166, 167.) The will was void by reason of an undue suspension of the power of alienation. (*Everett v. Everett*, 29 N. Y. 39; *Schettler v. Smith*, 41 id. 328, 335; *Adams v. Perry*, 43 id. 487; *Garvey v. McDevitt*, 72 id. 556; *Hobson v. Hale*, 95 id. 588, 603; *Bascom v. Albertson*, 34 id. 584, 597; *Holland v. Alcock*, 108 id. 312; *Leonard v. Bell*, 1 T. & C. 608; *Yates v. Yates*, 9 Barb. 324; 34 N. Y. 620; *Rose v. Rose*, 4 Abb. Ct. App. 108; *Levy v. Levy*, 33 N. Y. 9; *Phelps v. Pond*, 23 id. 69.) The New York courts have judicial power only, which, as to wills, goes not beyond their interpretation and establishment as interpreted. (*Beekman v. Bonsor*, 23 N. Y. 298, 311; *Atty-Genl. v. Church*, 36 id. 452, 457; *Bascom v. Albertson*, 34 id. 584, 594, 607; *Le Fevre v. Le Fevre*, 59 id. 434, 441.) As the intent, both by the word "then" and by the conditions precedent, fixes a time in the future for vesting, arbitrary, appreciable and unlimited by life, there will never be a vesting. (*Rose v. Rose*, 4 Abb. Ct. App. 108; *Bascom v. Albertson*, 34 N. Y. 584, 597, 598; *Smith v. Edwards*, 23 Hun, 223; affirmed, 88 N. Y. 98, 102.) The charities failing, there is no conversion, since there is no object for it. But if the institute is upheld, there is still no conversion, in that the power to sell is discretionary. (*White v. Howard*, 46 N. Y. 144, 162; *Chamberlain v. Taylor*, 105 id. 185, 191; *Levy v. Levy*, 33 id. 97, 102; *Holland v. Alcock*, 108 id. 312.) Until sale, in the circumstances supposed, there being a power simply (*Moncrief v. Ross*, 50 N. Y. 431; *Cooke v. Platt*, 98 id. 35), the rents and profits vest in the heirs-at-law. (*Lent v. Howard*, 89 N. Y. 160.) The devise in the codicil to the testator's sister showed an intent to cut down the residue, and upon the lapse of the legacy, through the death of the devisee in the lifetime of the testator, the lands went to the testator's heirs-at-law. (*Van Buren v. Dash*, 30 N. Y. 393; *In re Benson*, 96 id. 499, 506; *Van Kleeck v. Church*, 20 Wend. 457, 475; 6 Paige, 600, 615; *Parker v. Bogardus*, 5 N. Y. 309; Reviser's Notes, 5 Edw. St. 624; *Lynes v. Townsend*, 33 N. Y. 558, 563; 2 R. S. 57, § 4; *Downing v. Marshall*,

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23 N. Y. 366, 375; *Kip v. Van Cortlandt*, 7 Hill, 346, 354; *Trustees v. Roome*, 93 N. Y. 313, 330: Bishop on Written Laws, §§ 82, 200; *People v. Potter*, 47 N. Y. 375, 379; *People v. Lacombe*, 99 id. 43, 49; *People v. Comrs. of Taxes*, 95 id. 554; *Burnside v. Whitney*, 21 id. 148; *Waring v. Waring*, 17 Barb. 552; *Thorne v. Cole*, 3 Edw. 330; *Betts v. Betts*, 4 Abb. N. C. 317, 418, 419, 429; *Mirehouse v. Scaife*, 2 M. C. 695, 706; *Cambridge v. Rous*, 8 Ves. 12, 25; *Blight v. Hartnoll*, L. R., 23 Ch. Div. 218; Maine's Ancient Law [2d Am. ed.] 174, 176, 182, 184; 7 Am. Law Rev. 56, 57; *Petit v. Smith*, 1 P. Wms. 7; *Farrington v. Knightly*, Id. 544, 548, 553; *Bennet v. Batchelor*, 1 Ves. Jr. 63; *Urquhart v. King*, 7 Ves. 228; *Mordaunt v. Hussey*, 4 id. 118; *Mence v. Mence*, 18 id. 351; *North v. Burdon*, 2 id. 496.)

Joseph A. Welch for T. W. Chambers, appellant. There is no ground for distinguishing between lapsed devises and lapsed legacies, upon the question whether they shall pass by a residuary limitation. (*Matter of Benson*, 96 N. Y. 499; 2 Blackstone, 378; 6 Cruise Dig. 6, 33; 1 Jarm. on Wills, 43; *Livingston v. Newkirk*, 3 J. Ch. 312; *Winchester v. Forster*, 3 Cush. 366, 369; *Prescott v. Prescott*, 7 Met. 141; *Hayden v. Houghton*, 5 Pick. 538; *Thayer v. Wellington*, 9 Allen, 283, 297; *Goodright v. Marquis of Downshire*, 2 B. & P. 600; *Brimmer v. Sohler*, 1 Cush. 132; *In re Bachelder*, 18 N. E. Rep. 225; *Smith v. Curtis*, 5 Dutcher, 345; *Turpin v. Turpin*, 1 Wash. 75; *Hyer v. Shobe*, 2 Munf. 200; *Culsha v. Cheese*, 7 Hare, 236; *Green v. Dunn*, 20 Beavan, 6; *Brown v. Higgs*, 4 Ves. 708.) All the real property of a testator devisable by him at the time of his death, and not then otherwise disposable under the will, falls within the force of the general residuary clause. (4 Kent's Com. 542; 20 Wend. 499; *Pond v. Bergh*, 10 Paige, 140, 149; *McNaughton v. McNaughton*, 41 Barb. 52; *Van Cortlandt v. Kip*, 1 Hill, 590; *Ellison v. Miller*, 11 Barb. 334; *Brown v. Brown*, 16 id. 569-574; *Hillis v. Hillis*, 16 Hun, 76; *In re D'Hommedieu*, 32 id. 10; *Youngs v. Youngs*, 45 N. Y. 258, 259;

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Floyd v. Carow, 88 id. 568.) The testator, in the limitation of his estate to the executors for the benefit of the eleven charitable corporations, if not in that for the establishment of the Delaplaine Institute, has, by blending the proceeds of the real estate with the personalty, stamped the entire residuary estate with the quality of personalty, in such a manner as to constitute the gift of the entire residuum a legacy, and the executors legatees thereof. (*Durour v. Motteux*, 1 Ves. Sr. 320; *Green v. Jackson*, 5 Russ. 35; *Salt v. Chattanooga*, 3 Beav. 576; *Bernard v. Mishull*, Johns. [Eng. Ch.] 276, 298; *Hutcheson v. Hammond*, 3 B. C. C. 148.) Any uncertainty that might be considered to exist under the light of a general residuary devise, has been obviated by the testator, by the employment of the most ample expressions of an intention to give all his estate; not otherwise disposable at his death by the will, to his executors for the accomplishment of his benevolent purposes. (*Smith v. Coffin*, 2 H. Bl. 444; *Grayson v. Atkinson*, 1 Wilson, 333; *Beachcroft v. Beachcroft*, 2 Vern. 690; *Doe v. Gilbert*, 6 B. Mon. 268; 3 Brod. & B. 85; *Wilce v. Wilce*, 5 M. & P. 682; *Hogan v. Jackson*, Cowper, 299; *Doe v. Hurrell*, 5 B. & Ald. 21; *King v. Denison*, 1 Ves. & B. 260.) As to the real property, pending the incorporation of the institute, the power of sale connected with the provisions of the will prevents the invalidity of perpetuity. (*Robert v. Corning*, 89 N. Y. 236-239; *Hobson v. Lent*, 95 id. 603-609; *Wetmore v. Parker*, 52 id. 460; *Garvey v. McDevitt*, 72 id. 556; *Burrill v. Boardman*, 43 id. 254, 258-260.) Supposing a conversion of the real estate to have been effected by the executors having exercised the power, then all the estate being personal, part originally such, and part such by the conversion, the rules relating to personal estate apply to the whole residuary estate. (*Gilman v. McArdle*, 99 N. Y. 451.) The procurement of a charter was a mere preliminary measure. (*Manice v. Manice*, 43 N. Y. 304; *Robert v. Corning*, 89 id. 238.) If the court shall adjudge that the residuum, or either portion thereof,

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fails to pass to the "Delaplaine Institute," then the secondary limitation, in favor of the eleven societies therein named, will take effect. (*McLean v. Freeman*, 70 N. Y. 81; *Schettler v. Smith*, 41 id. 328.) If the residuary estate is adjudged to belong to the eleven secondary legatees, then the power of sale, connected with this limitation, being imperative, operates as a conversion of the realty into personalty, as of the time of the testator's death, and the entire residuum passes as personalty. (*Lent v. Howard*, 89 N. Y. 169; *Chamberlain v. Taylor*, 105 id. 185.) If the residuary estate is adjudged to belong to the secondary legatees, then by reason of the conversion wrought by the clause bestowing it upon them, the rents accruing since the testator's death go to the executors for the benefit of those legatees. (*Stagg v. Jackson*, 1 N. Y. 206; *White v. Howard*, 46 id. 162; *Lent v. Howard*, 89 id. 169; *Chamberlain v. Taylor*, 105 id. 185.)

C. E. Tracy for the American Bible Society, respondent. The provisions of the will for the Delaplaine Institute are invalid. (*Prichard v. Thompson*, 95 N. Y. 76; *Will of O'Hara*, Id. 403; *Holland v. Allcock*, 108 id. 312.) Nor does the codicil help the matter out, for it fixes an absolute period of ten years, in place of a life or lives in being, within which the corporation is to be created. This is in itself also invalid. (*Burrill v. Boardman*, 43 N. Y. 254; *Shipman v. Rollins*, 98 id. 328.)

David McClure for the Roman Catholic Orphan Asylum, respondent. The testator having, at the time of his decease, his domicile, and all the real estate covered by the will, being in the state of New York, the will is to be construed according to the laws of this state. (Story on Conf. of Laws, §§ 431, 464-474; 1 Jarman on Wills, 1-3; *Dupuy v. Wurtz*, 53 N. Y. 560; *Bascom v. Albertson*, 34 id. 584.) The provisions for the incorporation of a charitable institution to carry out the testator's views, and for a transfer to it of testator's residuary estate are void. (1 R. S. 723, § 15; Id. 773, § 1; *Schettler v.*

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Smith, 41 N. Y. 328; *Bascom v. Albertson*, 34 id. 584; *Leonard v. Bell*, 1 Sup. Ct. [T. & C.] 608; *Levy v. Levy*, 33 N. Y. 97; *Matter of Russell*, 5 Dem. 388; *Everitt v. Everitt*, 29 N. Y. 39; *Tucker v. Tucker*, 5 id. 408; *Amory v. Lord*, 9 id. 403; *Moore v. Lord*, 47 Barb. 257; *Beekman v. Bonsor*, 23 N. Y. 298.) The provision directing division in case of invalidity of devise as to institute is valid. (*Rice v. Barrett*, 102 N. Y. 161; *Fowler v. Depau*, 26 Barb. 224; *Schettler v. Smith*, 41 N. Y. 328; 2 Redf. on Wills, 217.) The word "then," as used in the will, is a proper if not a necessary word for joining the two parts of this sentence, and is, therefore, a conjunction with but one meaning, in substance, viz., "in consequence of" or "in that case." It is synonymous with the phrase "in the event" previously used. (Stormonth's Dict. word "then;" Worcester's Dict. word "then.") The charitable institutions are entitled to all accretions since death of testator. (3 Redf. on Wills, 139; *Lent v. Howard*, 89 N. Y. 169; *Moncrief v. Ross*, 50 id. 431.) Interest is payable upon the bequest of \$1,000 to each of certain charitable institutions made by the ninth clause, beginning one year after testator's death. (Redf. Law of Sur. Cts. 600, 601.)

Austin Abbott for American Home Missionary Society et al., respondents. The trust sought to be created by the eleventh clause of the will and the seventh clause of the codicil is invalid. (*Holmes v. Mead*, 52 N. Y. 337, 338; *Bascom v. Albertson*, 34 id. 584; *Yates v. Yates*, 9 Barb. 324; *King v. Rundle*, 15 id. 139; *Voorhees v. Presbyterian Ch.*, 17 id. 103; *Beekman v. People*, 27 id. 260; *McCaughal v. Ryan*. Id. 376.) Assuming that there is no equitable conversion, and that the trust deals with real estate as such, it is void as, within the statutes, in relation to perpetuities, as the real estate embraced by the trust is not to vest at the testator's death, or within a period thereafter measured by human life. (1 R. S. 723, §§ 14, 15; *Leonard v. Bell*, 1 Sup. Ct. [T. & C.] 608; *Hawley v. James*, 16 Wend. 61, 63; *Boynton v. Hoyt*, 1 Denio, 53; *Amory v. Lord*, 9 N. Y. 403; *Beekman v. Bon-*

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sor, 23 id. 298; *Schettler v. Smith*, 41 id. 328; *Knox v. Jones*, 47 id. 389, 397; *Bascom v. Albertson*, 34 id. 584; *Yates v. Yates*, 9 Barb. 324; *Phelps v. Pond*, 23 N. Y. 69; *Morgan v. Masterton*, 4 Sandf. 442; *Ker v. Dungannon*, 1 D. & W. 509; Lew. on Perpet. 147, 170-172; *Leonard v. Burr*, 18 N. Y. 96; *Levy v. Levy*, 33 id. 97; *Phelps v. Phelps*, 28 Barb. 121; *White v. Howard*, 46 N. Y. 144; *Sherwood v. Am. B. Soc.*, 4 Abb. Ct. App. Dec. 227; *Rose v. Rose*, Id. 108.) If the provisions of the will work an equitable conversion, and the estate is to be regarded as personal estate in the hands of the executors and trustees, the trust is equally void. (1 R. S. 773, § 1; 3 id. [7th ed.] 2256; *Adams v. Perry*, 43 N. Y. 487, 490, 491; *Schettler v. Smith*, 41 id. 328, 334; *Knox v. Jones*, 47 id. 389, 397.) This trust also works an unlawful accumulation of rents and profits of real estate, if there is no equitable conversion. (1 R. S. 726, § 37, 773, § 3; 3 id. [7th ed.] 2178, § 3, 2257, § 3; *Cook v. Lowry*, 29 Hun, 20, 24; 95 N. Y. 103; *Barbour v. De Forest*, Id. 13; *Pray v. Hegeman*, 92 id. 508.) The trust seeking to found the "Delaplaine Institute for the Relief of the Friendless" being void, the substituted gift to the various religious and charitable societies is valid and takes effect. (*Jackson v. Phillips*, 14 Allen, 539; *Brattle Sq. Ch. v. Grant*, 3 Gray, 142; *Odell v. Odell*, 10 Allen, 5, 7; *Armstrong v. Armstrong*, 14 B. Mon. 333; *Morgan v. Masterton*, 4 Sandf. 442; *Du Bois v. Ray*, 35 N. Y. 162; *Harrison v. Harrison*, 36 id. 543; *Bean v. Bowen*, 47 How. Pr. 306; *Doubleday v. Newton*, 27 Barb. 431; *Dupre v. Thompson*, 8 id. 537; *Hull v. Hull*, 24 N. Y. 647; *King v. Whaley*, 59 Barb. 71; *Barnum v. Barnum*, 26 Md. 119; *Gilman v. Reddington*, 24 N. Y. 9; *Bulkley v. De Peyster*, 26 Wend. 21; *Meserole v. Meserole*, 1 Hun, 66; *Ells v. Lynch*, 8 Bosw. 465; *Manice v. Manice*, 43 N. Y. 303, 363; , *Blanchard v. Blanchard*, 4 Hun, 287; 70 N. Y. 615.) The word "then" accompanying the condition of the gift to the societies does not indicate a lapse of time during which the gift shall not vest and thus suspend the ownership. It is equivalent to the words "in that event." (*Barker v. Southerland*, 6 Dem. 220, 223; *Hennessy v. Pat-*

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terson, 85 N. Y. 91, 101; *Bedell v. Guyon*, 12 Hun, 396; *Matter of Mahan*, 98 N. Y. 372, 377.) The language of the will works an equitable conversion of real property into personalty in the event the trust first sought to be created is void. (*Kane v. Gott*, 24 Wend. 641; *Stagg v. Jackson*, 1 N. Y. 206, 212; *Bramhall v. Ferris*, 14 id. 41; *Phelps' Exrs. v. Pond*, 23 id. 69; *Chamberlain v. Chamberlain*, 43 id. 432; *Hatch v. Bassett*, 52 id. 359; *Lent v. Howard*, 89 id. 169.) The rents of the real estate and the income of the personal property forming the residuary estate belong to the societies from the time of testator's death. (*Lent v. Howard*, 89 N. Y. 169.) The legacies of \$1,000 each, given by the ninth and tenth clauses of the will, bear interest at the rate of six per cent per annum from one year after testator's death. (2 R. S. 90, § 43; *Dustan v. Carter*, 3 Dem. 149; *Carr v. Bennett*, id. 433.) The real estate devised to testator's sister, Emily Louisa Fuller, by the second clause of the codicil, falls into the residuary estate, the said Emily Louisa Fuller having died before the testator. (*Van Kleeck v. R. D. Church*, 6 Paige, 600; 20 Wend. 457; *Hollis v. Hollis*, 16 Hun, 78; *Thayer v. Wellington*, 9 Allen, 283, 295; *Van Beuren v. Dash*, 30 N. Y. 393.)

FINCH, J. The testator devoted the bulk of his estate to charity. He carefully explained in his will that he left neither wife nor children; that his brother and sisters and nieces were already in comfortable, if not affluent, circumstances; and so he felt at liberty, after some moderate gifts to them, to follow "the impulses of his own heart" and his "sense of duty" by devoting the rest of his property to the rescue and help of the unfortunate. Two of his nieces, Mrs. Schiefelin and Mrs. Beekman, accepted the disposition which he made, but his sister, Mrs. Chase, in her own right and as administratrix of the deceased brother, seriously disapproves, and is now here upon appeal seeking to wrest the property from the uses of charity, and, to that end, invoking the aid of established rules of law to destroy the trust created by the

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will, and break through its fences into the fortune which the testator, at least, intended to withhold.

His primary purpose was to found and endow an institution to be denominated the Delaplaine Home for the Friendless. It was to be situated in the city of New York. Its object, as it existed in his mind, was indicated only by its name, and his reference to a similar institution already incorporated and doing its charitable work. He says: "My desire is that the object of the same and the class of persons to be relieved and benefited thereby should be similar to the object and to the recipients of the charity of the institution in the city of New York, now known as the Home for the Friendless, my wish being to make it similarly useful." To accomplish his purpose he directs his executors to apply for and obtain from the legislature, as early as practicable, an act of incorporation; and in a codicil to the will recommends and directs that it be obtained before the expiration of ten years from his decease, but repeats the injunction that it be obtained as soon as possible. There seems to have been in his mind some lurking doubt of the validity of his trust, and some fear that collaterals might covet his wealth, and so he provides an alternative or substituted devise and bequest of the same residue to a number of existing charitable corporations, which he names, "in the event," as he phrases it, "that this bequest and devise of my residuary estate should be adjudged or prove invalid, or its execution be impossible, either by judicial decision or from any other cause." The courts below have held that the gift to the corporation to be created is invalid, because it suspends the absolute power of alienation beyond the statutory limit, and from that determination the executors have appealed. Those courts also decided that the substituted bequest to the charitable societies named was valid, and from that decision Mrs. Chase appeals. Two questions are, therefore, presented for our consideration.

First. Can the gift to the unincorporated and non-existing institution be sustained? It is quite apparent that the testator expected and the will contemplated a delay before vesting in

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the intended beneficiary long enough to enable it to come into being through the consent of the sovereign, and which by possibility might extend to a period of ten years. Such incorporation was dependent upon the will of the legislature. Its consent could reasonably be anticipated, but was not at all certain. Eleven existing corporations, more or less useful and influential, were to take the property if a charter should be withheld, and under their possible pressure and argument the legislature might think that the interest of the state would be better subserved by the strengthening of existing institutions which had passed beyond the stage of experiment than by the creation of a new one, more especially when a Home for the Friendless already existed. It might be argued that under the will a choice of alternatives was fairly left to the state, which it might make by granting or refusing a charter to the proposed institution. The delay contemplated was not incidental merely to a result certain and possible, as in *Robert v. Corning* (89 N. Y. 225) where it was the time reasonably needed for a conversion in the ordinary manner, but contingent upon the uncertain action of the state, which might not take place at all, and leave a period of ten years during which the power of alienation would be suspended. It is not material to consider where the fee would lodge in the interim, whether in the executors, by force of an express or implied trust, or in the heirs by descent, subject to be divested by the happening of the contingency. In either case there was contemplated a period measured by years and not by lives in being during which there would be no persons in existence by whom an absolute estate in possession could be conveyed. The authorities fully and clearly determine the invalidity of such a limitation. In *Bascom v. Albertson* (34 N. Y. 584) the gift was to such persons in Vermont as might be appointed by the Supreme Court of that state as trustees of an institution to be located at Middlebury for the education of females. Beyond a criticism upon the uncertainty of the object, the court held that the bequest was void because it was contingent and executory and involved an illegal suspension of the ownership of

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the fund. To a similar effect are *Leonard v. Burr* (18 N. Y. 107) in which the gift was to the village of Gloversville, when it should be incorporated, for a public library; *Dodge v. Pond* (23 id. 69), where the bequest was for a college to be founded in Liberia; *Beekman v. Bonsor* (23 id. 306), in which an effort was made to found a dispensary; and *Rose v. Rose* (4 Abb. Court of Appeals Dec. 108). One vice in all these cases was that by force of the limitations created the ownership was left "swinging in abeyance," doubtful of its direction and ultimate resting-place, and this for a period longer or shorter, and not measured by lives in being. Where that limit of suspension was provided the trust escaped condemnation; as in *Shipman v. Rollins* (98 N. Y. 311), where the gift was to vest or fail at the end of the one life of the widow; and in *Burrill v. Boardman* (43 id. 254) where a hospital was to be incorporated, but within the two lives of a nephew named and the youngest of the executors.

It does not save the gift that in the present case a Home for the Friendless could have been incorporated under the general law, for such a corporation the testator did not intend or direct, but specifically required that his donee should be a corporation formed under a special charter. The restrictions in the general law made it inappropriate to the testator's design, but, whether so or not, we cannot substitute for his explicit direction something other and different, and outside of his expressed purpose. Nor does it help the situation to say that there was an equitable conversion resulting from the power of sale which, though discretionary, was claimed to be essential to the scope and plan of the will; and that the property treated as personal was not within the statute regulating trusts, as was held in *Gilman v. McArde* (99 N. Y. 451). That doctrine does not reach or affect the prohibition of the statute against a suspension of the absolute ownership of personal property for more than two lives; and a power of sale does not avoid the statute when the resultant proceeds wear the same fetters as restrained the alienation of the land. In

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Bascom v. Albertson (supra), the whole residue covered by the bequest was of personal assets in this state; and if, in the present case, the land be deemed money, the fundamental difficulty is not removed. I can discover no permissible escape from the conclusion that the primary devise for a new Home for the Friendless was invalid.

Second. The next question respects the consequences of that conclusion. One would suppose, as the courts below have decided, that the alternative and substituted devises and bequests to the eleven charitable corporations would vest at the death of the testator; but in behalf of Mrs. Chase it is argued that a suspension was contemplated until the final judgment of the court declaring the invalidity of the primary devise. I think we may make short work of that proposition. The judgment of the court does not make or create the invalidity; it declares its existence at the date of the testator's death, and *eo instanti* the alternative devises took effect. The testator's reference to a judicial decision is accompanied by the expression as to his primary devise "if it shall *prove* invalid;" that is, if it shall turn out invalid, or shall be ineffective. His use of the word "then" is in the sense of in that event, and his obvious meaning, which no refinement of criticism can obscure, is that if his devise to the non-existent corporation be void the alternative gifts shall vest. They so vested at his death. Our judgment merely ascertains that fact and settles it, but it existed before our decree, and at the instant of the testator's decease. No question is here raised as to the capacity of the eleven corporations to take.

Third. But a third question, of a minor character as to the amount involved, is presented for our determination. By the codicil to his will the testator gave to his sister, Emily L. Fuller, two lots of land to be held by her in fee simple. She died in testator's lifetime, and the old rule that while lapsed bequests fall into the residue, lapsed devises do not, but go to the heir as undisposed of by the will, is invoked to carry the land to the heirs and take it from the charities. I think that

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rule must be regarded as changed, and that there is now no reason for difference and so no difference between lapsed legacies and lapsed devises as it respects the operation upon them of a general residuary clause. Among the numerous reasons which have been assigned for the common-law rule, some of which were always artificial and unsatisfactory, the principal and most sensible one is well stated by LEARNED, J., in *Hillis v. Hillis* (16 Hun, 76), and by GROVER, J., in *Youngs v. Youngs* (45 N. Y. 254). That reason was that the right to dispose of land by will, when regained after its loss, came in the form of a right to dispose of uses, and, since the appointment of uses was a present act, the power to devise was held to apply at the date of the will or of the disposing act, and so the residuary clause would cover neither lapsed devises nor after-acquired lands. This reason wholly disappeared when our statute made the will speak from the testator's death both as to real and personal property. It provides that where a testator, in express terms, devises all his real property or indicates his intent to dispose of it all, the will shall be construed to pass all which he was entitled to devise at the time of his death. (2 R. S. 57, § 5.) As I read the case of *Youngs v. Youngs*, the lapsed devise was carried to the residue upon two grounds; one, that the rule as to lapsed devises had become the same as to lapsed legacies, and, the other, that a contingent remainder framed by the will was wholly undisposed of unless covered by the devise of the residue. The same opinion as to a change in the rule is expressed in *Hillis v. Hillis*, though it was deemed not essential to the result finally reached. The subject came under discussion in the courts of Massachusetts after an enactment similar to our own, and resulted in a conclusion which put lapsed devises upon a footing identical with lapsed legacies. (*Thayer v. Wellington*, 9 Allen, 283.) I think that must be regarded as the correct rule applicable to a general residuary clause which is not narrowed or restricted by the terms of its own construction. The testator in the present case clearly expressed his intention to pass all his property, and that

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nothing additional should pass to his heirs beyond what he had effectually given them. He explains his reasons for that; speaks of an intended disposition of "the remainder" of his property; and then formally devises and bequeaths to his executors all the rest, residue and remainder of his estate, both real and personal, in trust. I think we should hold that the lapsed devise fell into the residue. Since, in the event which has happened of the vesting of the residue in the eleven charitable societies, there was an imperative direction for the conversion of the real estate into money and a gift of the proceeds, it follows that the rents and profits go with the residue to the ultimate legatees. (*Lent v. Howard*, 89 N. Y. 169.)

The judgment should be affirmed, with costs to all parties payable out of the estate.

All concur.

Judgment affirmed.

MARTHA J. PARSONS, as Executrix, etc., Respondent, v. THE
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COM-
PANY, Appellant.

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117	296
113	355
120	122
120	126

113	355
166	615

The duty of active vigilance required of persons going upon railroad tracks must be adapted to the circumstances of the case, and when the company, by its own conduct and its published regulations, has led the public to believe trains will not be run upon its tracks at specified times and places, persons having occasion to cross them have the right to rely upon these assurances, and are not necessarily guilty of negligence when injured by prohibited trains while doing so.

In an action to recover damages for alleged negligence causing the death of M., plaintiff's testator, these facts appeared: M. was a passenger on one of defendant's trains going north; he got out at a way-station on the west side of the track, walked quite rapidly to the north a short distance by the side of the train, and then, in attempting to cross a track to the west, was struck and killed by a freight engine which was moving rapidly backward. When he saw the engine he attempted to jump from the track, but failed to escape. The accident occurred within the station-yard upon grounds where passengers were accustomed to pass and repass in going to and from trains. Defendant's

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rules require freight trains to approach stations slowly and to stop before reaching a station, at which a passenger train is landing or receiving passengers. The freight train was visible from the station at the distance of about three hundred feet, but was partially concealed from view by a curve in the road and by trusses on a bridge which it crossed before reaching the station, and about twenty feet south of which the decedent was killed. No one saw the engine approaching until it got upon the bridge. The freight train was moving about forty feet a second; not more than ten seconds elapsed between the time M. alighted and when he was struck. During this time the engine of the passenger train was blowing off steam, making a loud noise. *Held*, that the case was properly submitted to the jury and the evidence justified a verdict for plaintiff; that M., having once looked when he alighted and seeing no train, had a right to assume none would be coming at such a rate of speed as would preclude him from crossing the track; also, that it was immaterial whether M. when he alighted ceased to be a passenger or not. Defendant claimed and gave evidence tending to show that the engineer in charge of the freight engine attempted to stop the train on approaching the station, by reversing the lever and shutting off steam, but was temporarily disabled from controlling it by a blow received from the lever, which slipped from its position after being reversed, and struck him. Expert testimony was given, tending to show that such an accident could not occur if the lever was properly reversed except from a defective appliance. *Held*, that the fact that the engineer was thus disabled did not excuse defendant from the charge of negligence. *It seems* a passenger on a railroad train does not lose his character as such by alighting at a regular station, although he has not yet arrived at the terminus of his journey. Where illegal evidence has been received without objection, the remedy of the party is by motion to strike it out; an objection to its reception and an exception is not available.

(Submitted March 22, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 14, 1888, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for injuries causing the death of Thomas Murphy, plaintiff's intestate, alleged to have been caused by defendant's negligence.

The material facts are stated in the opinion.

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George C. Greene for appellant. The cause of action stated in the plaintiff's opening, and upon which the verdict was rendered, is not the cause of action stated in the complaint, but is an entirely distinct and different cause of action; so that the court would have no power to amend the complaint to conform to the proofs. Such an action was formerly known as an action on the case for the tort arising from the breach of such duty, and such breach is the gravamen of the action. (*Emigh v. P., F. W. & C. R. R. Co.*, 4 Biss. 114; 2 Chitty's Pleadings [11th Am. ed.] 646, 650; 1 id. 135; *Notton v. W. R. R. Corp.*, 15 N. Y. 444-446; 1 Addison on Torts, 631; *Ross v. Mather*, 51 N. Y. 108, 112; *Hanse v. Phinney*, 20 Hun, 153; *Clift v. Rodger*, 25 id. 39-42; *Volkening v. De Graff*, 44 N. Y. Supr. Ct. 424; *S. C.*, 81 N. Y. 268-272; *Tooker v. Arnoux*, 76 id. 397; *Catlen v. Adirondack Co.*, 11 Abb. N. C. 377.) If the defendant performed its contract and discharged the duty imposed upon it as a common carrier of passengers, from the time Mr. Murphy became a passenger until, by his own act, he ceased to be a passenger, and the relation of carrier and passenger was terminated, the cause of action stated in the complaint is fully met and answered. Having left the train while in motion without any invitation or direction by defendant, he ceased to be a passenger and the defendant owed him no duty. (*Comm. v. B. & M. R. R. Co.*, 129 Mass. 500, 502, 503; *Hickey v. B. & L. R. R. Co.*, 14 Allen, 432; 3 id. 18; 7 id. 207; Thompson on Negligence, 459; *O. & C. R. R. Co. v. Stratton*, 78 Ill. 88; *Bridges v. N. L. R. R. Co.*, L. R., Q. B. 377; *H. R. R. Co. v. Scheebe*, 44 Ill. 460; *L. S. & M. S. R. Co. v. Bangs*, 3 Am. and Eng. R. R. Cas. 427, 431; 50 Ga. 357; *State v. G. T. R. Co.*, 58 Me. 176; *Jewell v. C. S. & M. R. Co.*, 54 Wis. 610; 26 Alb. Law Jour. 239.) There is absolutely no evidence in the case that the deceased exercised any care whatever; the undisputed evidence is he did not, and it is self-evident that if he had he could have avoided the injury. (*Woodward v. N. Y., L. E. & W. R. R. Co.*, 106 N. Y. 369; *Wheelwright v. B. & A. R. R. Co.*, 135 Mass. 225, 227, 228; *Tully v. F. R. R. Co.*,

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134 id. 499, 500.) Plaintiff cannot recover if it appears that he attempted to cross the track without looking to see if a train was coming. (*Woodward v. N. Y., L. E. & W. R. R. Co.*, 106 N. Y. 369; *Wright v. B. & M. R. Co.*, 129 Mass. 440; *Nicholson v. Erie R. Co.*, 41 N. Y. 542; *Bancroft v. B. & W. R. Co.*, 97 Mass. 279; *Cordell v. N. Y. C. R. R. Co.*, 75 N. Y. 330-332; *Bunn v. D. L. & W. R. R. Co.*, 6 Hun, 303; *Salter v. U. & B. R. R. Co.*, 75 N. Y. 273; *Kellogg v. N. Y. C. R. R. Co.*, 79 id. 72, 76; *Biesigel v. N. Y. C. R. R. Co.*, 34 id. 625; *Beck v. Corbin*, 92 id. 658; *Hamm v. N. Y. C. R. R. Co.*, 50 N. Y. Supr. Ct. 78.) The court erred in permitting the plaintiff to prove that Marsh, the engineer in charge of the locomotive in question, was discharged by the defendant on account of another accident which occurred some nineteen months after the accident in question, when his train collided with a coal train at Black Rock. (*Schultz v. T. A. R. Co.*, 89 N. Y. 250; *Gale v. N. Y. C. & H. R. R. Co.*, 76 id. 594; 41 Conn. 515; 5 Denio, 108; 15 Hun, 383; 14 Allen, 255; 4 Park. Cr. 397; 6 N. Y. 345; 71 id. 601; *Cook v. Spalding*, 52 id. 661; *Baird v. Gillett*, 47 id. 186; *Anderson v. Rome, W & O. R. R. Co.*, 54 id. 334; *Hawley v. Hatter*, 9 Hun, 134; *Gahagan v. B. & L. R. R. Co.*, 1 Allen, 187-189; *Robinson v. F. & W. R. R. Co.*, 7 Gray, 92, 95; *Collins v. Dorchester*, 6 Cush. 396; *Warner v. N. Y. C. & H. R. R. R. Co.*, 44 N. Y. 471, 472; *Malten v. Nesbit*, 11 Eng. Com. Law, 318; 1 Greenleaf on Evidence, §§ 51, 52, 53; *Cary v. Hotelling*, 1 Hill, 311-316; *B. & S. R. R. Co. v. Woodruff*, 4 Md. 242, 253, 254; *McDonald v. Inhabitants of Savoy*, 110 Mass. 49; *Tenney v. Tuttle*, 1 Allen, 185.)

Charles B. Wheeler for respondent. The defendant was guilty of gross negligence. (*Terry v. Jewett*, 78 N. Y. 342; *Archer v. N. Y., N. H. & H. R. R. Co.*, 106 id. 589, 597; *Brassell v. N. Y. C. & H. R. R. R. Co.*, 84 id. 235, 245; *Klein v. Jewett*, 26 N. J. Eq. 474; 27 N. J. 550.) The plaintiff's testator was guilty of no contributory negligence. (*Terry v.*

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Jewett, 78 N. Y. 340, 344; *Brassell v. N. Y. C. & H. R. R. R. Co.*, 84 id. 243; *Archer v. N. Y., N. H. & H. R. R. Co.*, 106 id. 595; *Keefe v. B. & A. R. R. Co.*, 6 East. Rep. 401.) There is no variance between the cause of action set forth in the complaint and the case proved on trial. (Code Civ. Pro. § 481.) The case as presented to the jury by the court was as favorable to the defendant as could be reasonably asked, and more than sustained by the rule. (*Terry v. Jewett*, 78 N. Y. 344; *Brassell v. N. Y. C. & H. R. R. R. Co.*, 84 id. 243; *Archer v. N. Y. C. & H. R. R. R. Co.*, 106 id. 595; *Keefe v. B. & A. R. R. Co.*, 6 East. Rep. 401.) It is competent to prove the rate of speed of a train by persons of ordinary experience. (*Salter v. U. & B. R. R. Co.*, 59 N. Y. 631.) The defendant's exceptions to the admission of evidence showing how the depot was accustomed to be used by passengers and persons alighting and waiting for trains are not well taken. (*Keefe v. B. & A. R. R. Co.*, 6 East. Rep. 400; *Boss v. P. & W. R. R. Co.*, id. 400.) The court committed no error in sustaining the challenge of the plaintiff to the competency of the two employes of the defendant called as jurors. (*C. R. R. Co. v. Mitchell*, 63 Ga. 179; *People v. Bodine*, 1 Denio, 281-300, 306; Chit. Black. sub. p. 1363; Bacon Abridg. Jur. 2, 347; Tidds' Pr. 852, 853, *Maloy v. Town of Pelham*, 4 N. Y. S. R. 828; *Robinson v. Randall*, 82 Ill. 521; *Sullings v. Shakespeare*, 46 Mich. 408; *Burt v. Pangand*, 99 U. S. 180.)

RUGER, Ch. J. The evidence in the case was, on some points, conflicting, but the jury were authorized to find, and, upon the defendant's appeal, we must presume that they found the facts in conformity with the plaintiff's proof. By this it appeared that the plaintiff's testator was run over and killed at the Ferry street station, in the city of Buffalo, by the engine of a freight train, belonging to the defendant, moving southerly at the rate of from twenty to thirty miles an hour. He was a passenger on a train going northerly from the Exchange street station, Buffalo, to La Salle, and beyond, and had traveled

three miles of the distance when he reached the Ferry street station, where the train was accustomed to stop for the purpose of taking on and letting off passengers. As the passenger train reached the station-house, after it had been called by the brakeman, and while it was going slowly, but had not yet entirely stopped, the deceased stepped down from the second car upon its westerly side upon a plank-walk, or platform, and proceeded along by the side of the moving train for some forty or fifty feet when he attempted to cross over the westerly track. Before this the passenger train had entirely stopped. When he reached a point about ten feet from the passenger train, and being then between the rails of the westerly track, he was struck by the engine of the freight train which was backing down in a rapid manner. The whole transaction occurred in front of the station-house, and within the station yard, upon ground where passengers were accustomed to pass and repass in going from and coming to the trains. The rules of the defendant required freight trains to approach stations slowly, and to stop before reaching stations at which a passenger train is landing or receiving passengers. The freight train came from the north, and at the distance of about 300 feet from the station was visible, although partially concealed from the view of those standing at the station by a curve in the road, and also by trusses upon a bridge over Ferry street, running immediately north of the station grounds, which trains going south were obliged to cross before reaching the station. The deceased was, when struck, about twenty feet south of the bridge. He was seen walking quite rapidly to the north, in the direction of the approaching train, when he turned and started to go across the track, and as he saw the train attempted to jump but failed to prevent a collision, and was struck while in the act of jumping to avoid it. It did not appear for what purpose the deceased was going across the westerly track, but it was stated that he sometimes got off and communicated with relatives or friends, who lived next the station yard, on the west side, as he passed over the road.

As the deceased walked along the track he was necessarily

looking in the direction from which the freight train was approaching, but no positive proof was given that he looked towards it immediately before he was struck, and it is not probable that he could have seen it if he had looked when he first alighted, or for some seconds thereafter. Not to exceed ten seconds elapsed between the time when he alighted from the train and that when he was struck, and during that time the engineer of the passenger train was exhausting its steam, making a loud noise. The freight train was running probably at the rate of forty feet a second and, when the deceased first alighted, was probably beyond the line of his vision.

We are of the opinion that the case was, in all of its aspects, one for the jury. The point made by the appellant that there was a variance between the cause of action proved and that laid in the complaint is not well taken. The complaint stated all of the facts necessary to maintain the action, and complied with the requirements of the Code in that respect. Evidence was given tending to support the allegations of the complaint, and it was for the jury to find whether they had been proved or not.

The contention that the negligence of the defendant, as alleged, consisted only of its omission to perform the duty which it owed to the deceased as a passenger, is founded upon a misconstruction of the language of the complaint. We think it immaterial whether the deceased, when he alighted from the passenger train, ceased to be a passenger or not. He was certainly neither a wrong-doer nor trespasser by so doing. He might thereby have subjected himself to increased risks, for which he would have no redress against the railroad company, but if he should be afterwards killed by the gross negligence of the company without fault on his part, the company would be liable. This was the case stated by the complaint. The defendant also claims that it was not negligent in running its freight train through the station at a high rate of speed while a passenger train was there engaged in taking on and loading passengers. This claim is mainly based upon evidence that

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the engineer in charge was temporarily disabled from controlling his engine by an accident received from the lever which slipped from its position, after being reversed, and struck him a violent blow. The argument is that the engineer had performed his whole duty, in respect to stopping the train, by reversing the lever and shutting off steam. Some evidence was given for the defendant by its employees that they were not cognizant of any means of retaining the lever in its place after being reversed, except what were in use on this engine. Other experts, however, gave evidence tending to show that such an accident could not occur if the lever was properly reversed, except from a defective appliance. It, however, requires no expert to determine these facts, for it is obvious to the most ordinary comprehension that a reliance upon a lever which is liable to be forced from its place by the natural action of the machinery, in a matter of such importance, is an act of the grossest carelessness. The remedies for such a fault are so numerous and common that they must be presumed to be within the knowledge of all intelligent persons. We think it an alarming proposition to assert that a railroad company is to be excused from the consequences of running trains at great speed through stations, or in the streets of a populous city, because of an impossibility of its servants to control the powers which propel them. If this lever was liable to be displaced by the working of the machinery, it was the plain duty of the engineer to hold it in its position until the stoppage of the train had produced a compliance with his instructions and removed the danger. This would have required his attention for, possibly, ten seconds of time. The negligence of the company in running its train through the station at a high rate of speed is recognized by the rules of the company, and it is too obvious to require discussion.

A more difficult question arises over the allegation of contributory negligence on the part of the deceased. We do not think that a passenger on a railroad train loses his character as such by alighting from the cars at a regular station from motives of either business or curiosity, although he has not

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yet arrived at the terminus of his journey. It cannot properly be said, we think, if a passenger leaves a train for the purpose of obtaining refreshments at a regular station, or transacting business during its stay there, but intending to return and continue his passage, ceases to be a passenger or loses the right of being protected by the regulations which the company have provided for the safety of persons traveling on its cars and using its station-grounds. He may not stand upon the tracks or go thereon without using the care and caution required of prudent persons under the circumstances of the case; but if a person under such circumstances is injured, by the omission of the servants of the company to obey rules adopted for the protection of persons in that situation, we think it becomes liable for injuries thus received. The rule which prescribes it to be the duty of persons to exercise care and caution in going upon railroad tracks and to use their senses of seeing and hearing for the purpose of discovering and avoiding dangers, is one frequently found in reported cases, and, as a general rule, is salutary and just. But the duty of active vigilance must be adapted to the circumstances of the case, and if the offending company has by its own conduct and by its published regulations led the public to believe that trains would not be run on its tracks at specified times and places, persons having occasion to cross them have the right to rely on the assurance of the company and are not necessarily guilty of negligence when injured by prohibited trains while doing so. The deceased was justified in supposing that no rapidly moving train would come into the station while he remained in the yard and was engaged in communicating with his friends on the west side. He had frequently done so before and had been lulled into a sense of security by the immunity which he had before enjoyed and the reliance which he placed upon the care exacted of its servants by the railroad company. It is quite doubtful whether he was able to see the freight train until he approached near the place where he started to cross the westerly track, as it was, presumptively, approaching at

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the rate of at least forty feet per second, and the jury were justified, from the evidence, in finding that he had looked in the direction in which he was walking and did not see the train. That he did not hear it is quite conceivable as the exhaust steam of the passenger engine made considerable noise, and the witnesses generally agree that no one saw or heard the freight engine until it got upon the bridge, and, after that, it passed the station in an instant of time. Having once looked and seeing no train, he had a right to assume that none would be coming at such a rate of speed as would preclude him from crossing a single track. It is probably true that if he had looked both ways at the moment of stepping upon the track, he could have seen the approaching train, but that might be said of almost every accident of a similar character, and is a degree of vigilance seldom adopted by anyone, and would require the impossible feat of looking in opposite directions at the same time, or anticipating the point from which he was to be assailed. The law does not require this; neither is there any rule which will defeat a recovery in cases of this kind merely because it was possible for an injured person to discover an approaching train. The law does not forbid persons from crossing railroad tracks or impose upon them exclusive responsibility for damages incurred in making such an attempt. The question is, whether the injured party, under all of the circumstances of the case, exercised that degree of care and caution which prudent persons of ordinary intelligence usually exercise under like circumstances. This rule must in all cases, except those marked by gross and inexcusable negligence, render the question involved one of fact for the jury.

We think the jury could properly find that the deceased did, under the circumstances of this case, exercise such care and caution as exempted him from the imputation of negligence. (*Terry v. Jewett*, 78 N. Y. 338; *Brassell v. N. Y. C. & H. R. R. Co.*, 84 id. 241; *Archer v. N. Y., N. H. & H. R. R. Co.*, 106 id. 589.)

The defendant also claims that the court improperly allowed

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the plaintiff's counsel to cross-examine the witness Marsh and prove why he was discharged from the defendant's employ some eighteen months after the accident in question. The question objected to was: "What was the occasion of your going when you did go?" This question was competent on the question of the witness' credibility, and if competent for any purpose, the objection to it was not well taken, although counsel claimed it to be admissible on an erroneous ground. The witness did not answer this question, and the question was then put "what was the occasion of your leaving the company's employ?" This was not objected to and the witness answered, "I was coming into Black Rock yard with a coal train and had a collision with a switch engine pulling off the branch with another train." Question. "Did they discharge you for it?" Answer. "Yes, sir." The defendant then made its objection and took its exception. The evidence was then already before the jury without exception, and the defendant's remedy was to move to strike the evidence out. This he did not do. We think, therefore, the defendant did not raise the question properly; but if we were of the contrary opinion, we should not be inclined to reverse the judgment upon this ground. If the evidence tended in any way to injure the defendant, it was upon the question of the negligence of the defendant. This was established by evidence beyond dispute, and the testimony of this witness could not be said to have affected it. All of the evidence goes to show that the defendant ran its train at a high rate of speed through a crowded station in violation of its published rules.

There was practically no question for the jury in respect to the question of the defendant's negligence.

The case was submitted to the jury upon a charge eminently favorable to the defendant, and we think it had no reason to take exception to it.

Some few other exceptions were taken to the rulings of the trial court in the admission of evidence, but we think no

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errors were committed which authorize the reversal of this judgment.

The judgment should, therefore, be affirmed.

All concur, except EARL and GRAY, JJ., not voting.

Judgment affirmed.

113	866
185	74

In the Matter of the Judicial Settlement of the Accounts of
M. D. C. CRAWFORD et al., as Executors, etc.

EMELINE P. HAYWARD, Appellant, v. CHARLES S. BARKER
et al., Respondents.

The will of B. directed his executors to divide his residuary estate into a certain number of equal shares, one of which he gave to each of the children living at the time of his death of six deceased brothers and sisters named. Then followed this provision: "In case any one or more of the children of either or any of my deceased brothers and sisters mentioned in this clause of my will, shall die or have died before me leaving lawful issue surviving at the time of my death, then and in that case such issue of my deceased nephew or niece shall receive the share which his or her ancestor would have received under this clause of my will had she or he been living at the time of my death, excepting in the case of the issue of Lemuel Crawford, deceased, to whom this clause shall not apply. The children of the said Lemuel Crawford, deceased, having been left a legacy in a former clause of this will." Said Lemuel Crawford was a son of a sister of the testator, to whose children a sixth was given. Prior to the making of the will several of the children of the testator's brothers and sisters, named in the residuary clause, had died leaving issue who survived the testator. *Held*, that the provision was not strictly substitutionary, and the said issue took, irrespective of the time of the death of their parents, the share their parents would have been entitled to had they survived the testator, they taking as primary legatees, not as representatives by way of substitution to interests given in the prior clause.

The cases bearing on the question of construction considered and classified. Except in one instance specific legacies were given to the issue of nephews and nieces who had died before the making of the will; the amounts of these legacies, however, were not uniform or identical in amount with what they would take under the residuary clause, and they were smaller than the legacy given to Lemuel Crawford. *Held*, the fact that the testator excluded the issue of the latter from participating in the residuary estate

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because of the prior provision for them, did not exclude other issue similarly situated, as the will showed the intent that they should be included. *Mem. of decision below, 45 Hun, 294.*

(Argued March 25, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 1, 1887, which affirmed a decree of the surrogate of the county of Westchester on settlement of the accounts of M. D. C. Crawford et al., as executors of the will of Joseph S. Barker, deceased.

The question was as to the distribution of the residuary estate. The disposing clauses of the will are as follows:

"*First.* I direct my said executors to pay all my just debts and funeral expenses as soon as convenient after my decease.

"*Second.* I direct my said executors to pay to Rev. Morris D. C. Crawford the sum of five thousand dollars, which sum I give and bequeath to him irrespective of any sum which he may be entitled to receive, under the provisions of this will, as one of the children of my deceased sister, Mary Crawford.

"*Third.* I give and bequeath and direct my executors to pay as follows: That is to say, to J. Barker More, the son of Luther More, the sum of one thousand dollars. To Margaret and Mary Ellen, the granddaughters of my deceased brother Isaac Barker, each the sum of one thousand dollars. To Charles S., the grandson of my deceased brother Nathaniel Barker, the sum of two thousand dollars. To the three children of Dorinda Edwards, being the grandchildren of my deceased brother Thomas B. Barker, each the sum of one thousand dollars. To Wilbur F. Henderson, the grandson of my deceased brother Elijah C. Barker, the sum of two thousand dollars. To the two children of Joseph B. Crawford, being the grandchildren of my deceased sister Mary Crawford, each the sum of one thousand dollars. To the two sons of my niece Mary Stevens, each the sum of one thousand dollars. To the children of Lemuel Crawford, deceased, each the sum of two thousand dollars. To the son of Elmira Mickel, daughter of

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Mary Crawford, the sum of one thousand dollars. To my coachman, John Barron, the sum of five hundred dollars. To my gardener, Joseph Richards, the sum of two hundred and fifty dollars. To my house servant, Julia Byrnes, the sum of two hundred and fifty dollars. And to Anna Sullivan, formerly one of my house servants, the sum of two hundred and fifty dollars.

"Fourth. I give and bequeath and direct my executors to pay the sum of one thousand dollars to the children living at the time of my death of Mary Jane Gordon, being the grandchildren of my deceased brother Thomas B. Barker, the said sum of one thousand dollars to be divided share and share alike between such children living at the time of my death of the said Mary Jane Gordon.

"Fifth. I give and bequeath and direct my executors to pay to Jane Barker, Angeline Barker and Hester Haviland, daughters of my deceased brother Frederick Barker, each the sum of seven hundred dollars if they be living at the time of my death, but if either of the said daughters of my deceased brother, Frederick Barker, should die before me, then I give and bequeath and direct my said executors to divide the sum of twenty-one hundred dollars, share and share alike, among such of said daughters of my deceased brother Frederick Barker, mentioned in this clause of my will, as shall be living at the time of my death.

"Sixth. I give and bequeath and direct my executors to pay to Charlotte V., the widow of my deceased son Morris D. C. Barker, the sum of one thousand dollars if she be living at the time of my death.

"Seventh. All the rest, residue and remainder of my said estate I direct my executors to divide into equal shares; the number of said equal shares to be made one more than the number of legatees hereinafter mentioned in this clause of my will; and I give, devise and bequeath and I direct my executors to pay the amount of the said rest, residue and remainder of my estate, after being divided into equal shares, as follows: Two of such shares as above provided for to Grace Place, the

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wife of Barker Place. One share to Marion, daughter of Barker and Grace Place. One share to Emeline Hayward, daughter of my deceased niece, Susan A. Place. One share to Isabel Sullivan, daughter of my deceased niece Susan A. Place. One share to each of the children living at the time of my death of my deceased brother Isaac Barker. One share to each of the children living at the time of my death of my deceased brother Nathaniel Barker. One share to each of the children living at the time of my death of my deceased brother Thomas B. Barker. One share to each of the children living at the time of my death of my deceased brother Elijah C. Barker. One share to each of the children living at the time of my death of my deceased sister Jane Hart. One share to each of the children living at the time of my death of my deceased sister Mary Crawford, but in case any one or more of the children of either or any of my deceased brothers and sisters, mentioned in this clause of my will, shall die or have died before me leaving lawful issue surviving at the time of my death, then, and in that case, such issue of my deceased nephew or niece shall receive the share which his or her ancestor would have received under this clause of my will, had she or he been living at the time of my death, excepting in the case of the issue of Lemuel Crawford, deceased, to whom this clause shall not apply. The children of the said Lemuel Crawford, deceased, having been left a legacy in a former clause of this will."

Several of the children of the brothers and sisters named in the residuary clause had died before the making of the will, leaving issue who survived the testator; others of said children died between the time of the making of the will and the testator's death. The further facts, as far as material, are stated in the opinion.

J. K. Hayward for appellant. Only living legatees could share in the residue. (*Maberly v. Strode*, 3 Ves. 450; *Lake v. Robinson*, 2 Mo. 386.) A word occurring more than once

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in a will shall be presumed to be used always in the same sense, unless a contrary intention appears in the context. (3 Jar. [R. & T. ed.] 707; 1 Doug. 268; 3 Drew, 472; *Radcliff v. Buckley*, 10 Ves. 201.) The word "children" is restricted, by the express adjective "living," to the parents of contingent, future representatives. (*Crook v. Whitly*, 26 L. J. Ch. 350.) The word "children" also is restricted by the phrase, "mentioned in this clause of my will," to nephew degree living at the date of the will, because such only had been already "mentioned" for a provision in this clause. (3 Jar. [R. & T. ed.] 707; *Doe v. Rawding*, 2 Barn. & Ald. 452; *Norris v. Beye*, 13 N. Y. 283; Wigram, rule 6 [ed. 1872], 10; *Jones v. Doe*, 1 Scam. 276; 2 Jar. Ch. 29, 684, § 7; *Hunter v. Hunter*, 17 Barb. 85; *Hall v. Warren*, 9 H. L. 420; *Van Allen v. Moers*, 5 Barb. 10; *Downing v. Bain*, 24 Ga. 375.) Members of a class provided for *nominatim*, will not take a double provision by ambiguous parsing, nor by a subsequent class description for other members of the class. (*Dewitt v. Yates*, 10 Johns. 156; *Phillips v. Davies*, 92 N. Y. 199; *White v. Wakely*, 26 Beav. 24; *Creveling v. Jones*, 21 N. J. Law Rep. 573; *Early v. Benbow*, 2 Coll. 342; *Humphreys v. Benbow*, 2 Cox, 184; *Eddels v. Johnson*, 1 Giff. 22; *Branston v. Weightman*, 35 Ch. Div. 551; *Megson v. Hindle*, 15 id. 198; *Campbell v. Clark*, 10 Atl. Rep. 702; *Van Allen v. Moers*, 5 Barb. 113; *Shelly v. Bryer*, 1 Jac. 207; *Low v. Harmony*, 72 N. Y. 413; *Willis v. Jenkins*, 30 Ga. 167; *Palmer v. Horn*, 84 N. Y. 522; *Smith v. Lidiard*, 3 K. & J. 252; *Bagley v. Mollard*, 1 Russ. & Ry. 581.) Respondents are under a legal disability in their character of non-next of kin, which puts them *hors de combat* in a construction contest even for a single provision as against the next of kin. The court will not ransack the canons of interpretation for disinheritance. (*Roosevelt v. Fulton*, 7 Cow. 79; *Downing v. Bain*, 24 Ga. 372; *Hall v. Warren*, 9 H. L. 433; 2 R. S. 97, § 11; Code, §§ 12, 2514; *Slosson v. Lynch*, 43 Barb. 161; *Quinn v. Hardenbrook*, 54 N. Y. 86; *Swaine v. Kemmerly*, 1 V. & B. 469; *Harris v. Lloyd*, 1 T. & R.

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310; *Smith v. Lidiard*, 3 K. & J. 252; *Van Kleeck v. Dutch Church*, 6 Paige, 612; 20 Wend. 469; *Bender v. Dietrick*, 7 Watts & S. 284; *Graydon's Estate*, 25 N. J. Eq. 561; *Leigh v. Savidge*, 1 McCarter, 124; *Jackson v. Schaubert*, 7 Cow. 187; 4 Kent's Com. [11th ed.] 535 n; *Doe v. Dring*, 2 M. & S. 454; 15 Brington's Will, Haz. Reg. Penn. 50; *Cromer v. Pinckney*, 3 Barb. Ch. 466; *Porter's Appeal*, 45 Penn. St. 201.) It requires "a necessary implication," an "unambiguous gift" to make a good bequest as against the next of kin. (*Fleming v. Brooks*, 1 S. & L. 318; *In re Hull*, 21 Beav. 314; *Reed v. Stewart*, 4 Russ. 69; *Creveling v. Jones*, 21 N. J. Law Rep. 576.) Even the equity of an unprovided for co-equal claimant is counter-balanced, if handicapped with others already provided for. (*Branston v. Weightman*, 35 Ch. Div. 551; *Megson v. Hindle*, 15 id. 198; *Shelly v. Bryer*, Jac. 207; *Radcliff v. Buckley*, 10 Ves. 194.)

Joseph S. Wood for Charles S. Barker, respondent. An express and positive devise cannot be controlled by the reason assigned, or by subsequent ambiguous words, or by inference and argument from other parts of the will. (2 Redf. on Wills, 426.) It was not necessary, in order that the issue of the deceased nephew of the testator should share in the residuary estate, that that deceased nephew should have been living at the time of the testator's death. (*Teed v. Morton*, 60 N. Y. 502; *Tytherleigh v. Harbin*, 6 Sim. 329; *Clay v. Rennington*, 7 id. 370; *Lawrence v. Hebbard*, 1 Brad. 252; *Bell v. Beckwith*, 2 Beav. 308; *Abbey v. Aymar*, 3 Dem. 400; *Long v. Tabor*, 8 Penn. 229; *Wheeler v. Allen*, 54 Me. 232; *Christopherson v. Naylor*, 1 Mer. 320; *Loring v. Thomas*, 1 Dr. & Sm. 497; *In re Hotchkiss*, 8 L. R. 643; *Giles v. Giles*, 8 Sim. 360; *Rust v. Baker*, id. 443; *Jarvis v. Pond*, 9 id. 549; *Smith v. Smith*, 8 id. 353; *Faulding's Trust*, 26 id. 263; *Chapman's Will*, 32 id. 382; *Ive v. King*, 16 id. 46; *Coulthurst v. Carter*, 15 id. 421; *Gaskell v. Holmes*, 3 Hare, 438; *Etches v. Etches*, 3 Drewry, 441; *Hannam v. Sims*, 2 De Gex & J. 151; *Jordan's Trust*, 2 New, 57; *Parsons v. Guilford*, 10 Jur. [N. S.] 231;

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Atwood v. Alford, L. R., 2 Eq. 479; *Philp's Will*, L. R., 7 id. 151; *Potter's Trust*, L. R., 8 id. 52; *Barnaby v. Tassell*, L. R. 11 id. 363; *Adams v. Adams*, L. R., 14 id. 246; *Gowling v. Thompson*, 19 Law T. Rep. [N. S.] 242; *In re Sibley*, L. R., 5 Ch. Div. 494; *In re Smith*, id. 497; *Wingfield v. Wingfield*, L. R., 9 id. 658; *Harris v. Harris*, L. R., 11 id. 663; *In re Lucas*, L. R., 17 id. 788; *Miles v. Tudway*, 49 Law T. 664; *Cort v. Winder*, 1 Collyer, 320; *King v. Cleaveland*, 4 De Gex & J. 477; *Ashling v. Knowles*, 3 Drewry, 593; *Le Jaune v. Le Jaune*, 2 Keen's Ch. 701; *In re Orton's Trust*, L. R., 3 Eq. 375; *Martin v. Holgate*, L. R., 1 H. of L. 175; *Heron v. Stokes*, 2 Dr. & W. 98; *Lamphier v. Buck*, 5 Am. Law Reg. [N. S.] 224.)

Gwillim & Meyers for Mary E. Williams, respondent. The fact that Mary E. Williams is not specifically named in the earlier parts of the will, and is the only grandchild thus overlooked, is evidence of the testator's intention to provide for her under the residuary clause, for the testator was benevolently disposed to do something for all these grandchildren, and evidently intended not to neglect any one of them. (*Giles v. Giles*, 8 Sim. 360; *Lawrence v. Hebard*, 1 Bradf. 252; Jarman on Wills, 633.)

Walter Edwards for George B. Edwards et al., respondents. It is the intention of the testator, as expressed in his will, which is to govern, and this must be judged of exclusively by the words of the instrument applied to the subject-matter and surrounding circumstances. (1 Redf. on Law of Wills, 432, 433; *Chrystie v. Phylfe*, 19 N. Y. 344, 348; *Arcularius v. Geisenhainer*, 3 Bradf. 64; *Lytle v. Beveridge*, 58 N. Y. 592.) A clearly expressed intention in one portion of the will is not to yield to a doubtful construction in any other portion of the instrument. (1 Redf. on Wills, 433; *Corrigan v. Kiernan*, 1 Bradf. 208.) Extrinsic evidence is not admissible to alter, detract from or add to the terms of a will, except to rebut a resulting trust attaching to a legal title created by it, or to remove a latent ambiguity arising from words equally descrip-

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tive of two or more subjects or objects of gift. (Jarman's General Rules, 8; *Mann v. Mann*, 1 Johns. Ch. 231; 14 Johns. 1.)

ANDREWS, J. The decision in this case turns on the point whether, under the will, the issue of nephews and nieces of the testator, who died during his lifetime and before the making of the will take under the residuary clause, the share which their parents would have taken if they had survived the testator. His ten brothers and sisters had died before the date of the will, seven of whom left children surviving them at that time, but several nephews and nieces of the testator, brothers and sisters of surviving nephews and nieces had died, leaving issue, before the will was made. The living nephews and nieces claim that they only are entitled to the residue given by the will to the exclusion of the issue of nephews and nieces who died before the date of the will. If this was the intention of the testator, or if the language of the residuary clause requires the court to say that this was his intention, that intention must be imputed, whatever the court may think was his actual intention outside of the words used. The testator in the residuary clause directs his executors to divide his estate into equal shares, specifying the number, but not their amount. He gives five shares to individuals specifically named; two to the wife of a grand-nephew, one to this grand-nephew's daughter, and one to each of two children of a deceased niece. Then follows a gift of one share to each of the children "living at his death" of his deceased brother Nathaniel, and *mutatis mutandis*, one share to each of the children of five other deceased brothers and sisters mentioned. Three daughters of a deceased brother, living when the will was made, and then being over sixty years of age and without issue, were not included in the gift of the residue. They were the children of the testator's brother Frederick, who was not mentioned in the residuary clause. They were given a legacy of \$700 each in a prior clause of the will, with succession *inter sese*, in case of the death of any one before the testator's death.

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The particular language in the residuary clause, on which the controversy turns, immediately succeeds the gifts of the shares to the children of the testator's brothers and sisters, and is as follows: "But in case any one or more of the children of my deceased brothers and sisters mentioned in this clause of my will shall die, or have died before me, leaving lawful issue surviving at the time of my death, then and in that case, such issue of my deceased nephew or niece shall receive the share which his or her ancestor would have received under this clause of my will, had he or she been living at the time of my death, excepting in the case of the issue of Lemuel Crawford, deceased, to whom this clause shall not apply. The children of the said Lemuel Crawford, deceased, having been left a legacy in a former clause of this will."

The main argument in support of the contention that the issue of nephews and nieces of the testator who died before the making of the will are not comprehended in this clause is that the clause is strictly substitutionary, and that no one can take thereunder unless he is the representative of a nephew or niece living when the will was made, but who had died prior to the death of the testator. This argument treats the nephews and nieces living at the date of the will as the primary legatees, and the clause quoted as intended to provide simply for the devolution of their shares upon their issue, in case of their death intermediate the date of the will and the death of the testator.

There are a large number of cases to be found in the books, and especially in the English reports, upon the construction of wills, where a gift is made to a class of objects to be ascertained at the testator's death, or at some other future time, followed by a provision that in case of the death of some of the objects of the class before the death of the testator, the issue of child or children, or of nephews or nieces, or of the class, whatever it is, shall take. The question has frequently arisen whether the issue of deceased members of the class who died prior to the making of the will were entitled to take the share which the parent would

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have taken, if living at the date of the will, but dying before the death of the testator. It is manifest that the testator could include or exclude the issue of pre-deceased members of the class dying before the date of the will, and whether he did or did not include them is a question of construction of the words. The cases are divided into two general classes. In one class are the cases where the alternative clause is treated as strictly substitutionary, and in these it is held that only such issue can take as can show that they represent a person of the class who could, by possibility, have taken under the conditions existing when the will was made, but whose death after the making of the will prevented the primary gift from taking effect. In cases of strict substitution it is evident that an original member of the class pre-deceased before the date of the will could never have taken, and there could be no share of the parent to which the issue could be substituted. In these cases it is held that such issue are excluded, and that only issue of members of the class dying intermediate the date of the will and the death of the testator can take. The case of *Christopherson v. Naylor* (1 Mer. 319) is a representative case of this class. The other class embraces cases in which the words following a gift to a class are introduced in form or in effect by way of proviso, and are construed as adding to the class who are to participate, defined in the prior clause, another class, viz., the issue of deceased persons of such class, at whatever time they may have died, whether before or after the date of the will, such issue constituting another and distinct class, by way of original and substantive limitation. In cases of this kind it is held that the issue take as primary legatees, and not as representatives, by way of substitution to interests given in the prior clause. For examples of this class, we refer to a few of the cases. (*Loring v. Thomas*, Dre. & Sma. 497; *In re Chapman's Will*, 32 Beav. 382; *In re Potter's Trust*, L. R. 8 Eq. 52.) The distinction between the two classes of cases is stated with admirable clearness by JAMES, V. C., in the case of

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In re Hotchkiss's Trusts (L. R., 8 Eq. 642). It will be found, however, that the cases are not all reconcilable. The diversity of opinion arises in many cases, I apprehend, from the mental attitude in which the particular judge approaches the consideration of such a question, that is, whether he leans to a strict and literal construction of the language of a will or to a liberal and broad construction in aid of the probable intention of the testator. The tendency, however, is towards the inclusion of issue of pre-deceased children. The cases are collected by Jarman (2 Jar. 771 *et seq.*), and he states that even where there is no original and independent gift to the issue, but the claim is founded on a clause apparently of mere substitution, the court "anxiously lays hold of slight expressions as a ground for avoiding a construction which in all probability defeats the actual intention, by excluding the issue of a deceased child from participation in a family provision." The liberal construction was adopted by this court in *Teed v. Morton* (80 N. Y. 502).

But we are relieved in this case from the necessity of a critical examination of the cases on the general subject, for the reason that the language of the will, in the case before us, points unmistakably to the inclusion of the issue of pre-deceased children as primary legatees. The clause, "but in case any one or more of the children of my deceased brothers and sisters mentioned in this clause of my will, shall die or have died before me leaving lawful issue," etc., which immediately follows the gift to classes, is, we think, alone conclusive of the testator's intention to provide for the issue of pre-deceased children. The words "mentioned in this clause of my will," to the ordinary apprehension qualifies "brothers and sisters," the immediate antecedent, and, so construed, the issue who are to take are the issue of all the deceased children of his brothers and sisters mentioned, without reference to the time of their death. The intention to include all such issue, irrespective of the time of the death of the parent, is emphasized by the words, "shall die or have died," pointing both to death in the future and the past. Six of the testator's brothers and sisters

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are mentioned in the prior clauses. One brother is not mentioned, and the issue of his children are not included. The reason may have been that the living children of that brother had no children and had outlived expectation of issue, and the testator had provided for them in another clause. But a conclusive reason for the construction that the issue of pre-deceased children were intended to take, is found in the concluding clause of the residuary section of the will, which excepts from its provisions "the issue of Lemuel Crawford, deceased, to whom this clause shall not apply," adding as a reason "the children of said Lemuel Crawford having been left a legacy in a former clause of this will." Lemuel Crawford was a deceased nephew of the testator and the son of Mary Crawford, a deceased sister of the testator, and both had died before the making of the will. The exclusion *nominatim* of one of the issue of a child of the testator's sister Mary, who had died before the will was made, and who was one of the sisters mentioned to whose children shares were given, is cogent evidence that the testator intended to comprehend in the residuary gift all the issue of nephews and nieces who had died at any time before the making of the will, except in case of individuals of the class specially excluded.

The learned counsel for the appellant has argued with great learning and ability to show that, by the strict rules of grammar, the words "mentioned in this clause of my will" qualify the word "children," and not the words "brothers and sisters" immediately preceding. But this, we think, would not be the reading of common men, and grammatical tests always give way where, by applying them, the overruling intention discernable on a consideration of all the words of the will, would be defeated. It may be conceded that the words "but in case" naturally point to an alternative or substitutional clause, but this is not decisive. This form of expression, in substance, will be found in many cases falling under the second class above referred to.

It is also urged in support of the appellant's construction,
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that the opposite one results in a double provision for the issue of nephews and nieces who had died before the will was made. It is true that, except in one instance, specific pecuniary legacies are given to the issue of such pre-deceased nephews and nieces. The amounts of such legacies are not uniform, and there is no inference derivable from the face of the will that the testator intended to give all his property in equal shares to the objects of his bounty. The legacies given to the issue of pre-deceased nephews and nieces are not identical in amount with what they will take under the residuary clause, so that the latter cannot be said to be the same legacy given by inadvertence a second time. But, still more, he excluded the issue of Lemuel Crawford, deceased, for the reason that he had made a prior provision for them, but did not exclude other issue who were similarly situated, except that the legacies given to them were, in most instances, smaller in amount.

We cannot entertain a doubt that the proper construction has been given to the will by the courts below, and the judgment appealed from should, therefore, be affirmed.

All concur.

Judgment affirmed.

118	378
124	425
124	659
118	378
131	100

118	378
158	95

118	378
162	20

118	378
163	53

118	378
167	27

118	378
169	1267

118	378
170	534

MARTHA S. BOND, as Administratrix, etc., Respondent, v.
EDWARD B. SMITH et al., Appellants.

In an action to recover damages for alleged negligence causing the death of B., plaintiff's intestate, it appeared that defendants, S. & D., were the owners of certain premises in the city of B. occupied by defendant B. as their tenant. There was a store upon the premises, the rear of which was three feet from the line of an alley. Between the store and the alley was an open area eight feet deep. The buildings on each side of the store extended to the alley. The wall of the area adjoining the alley was faced with a stone coping seven inches above the alley and two feet wide, all of which was upon defendants' premises. The alley was closed at one end and was used only by persons having business with the rear of buildings facing thereon, and almost exclusively in the daytime. It had no sidewalks and was always incumbered with barrels, boxes and rubbish. M. was employed as a watchman, his duty being to pass

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through the alley hourly during the night and examine the windows and doors of certain buildings abutting thereon. M. was found in the area where he had fallen during the night, and died from the injuries received. He had been on duty in the alley for thirteen nights previous to the one on which the accident happened; on that night the alley was not lighted. *Held*, that a refusal to nonsuit was error; that the facts did not warrant an inference that the area was a nuisance; and that the evidence was insufficient to show or to justify an inference of the exercise of ordinary care and prudence on the part of decedent.

Bond v. Smith (44 Hun, 219) reversed.

(Argued March 25, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made April 19, 1887, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover damages for alleged negligence on the part of defendants, causing the death of Martin W. Bond, plaintiff's intestate.

The material facts are stated in the opinion.

George Wadsworth for Smith & Davis, appellants. To enable the plaintiff to maintain this action she must show that her intestate was free from negligence which caused or contributed to the injury; that the defendants were guilty of negligence, which was the sole cause of the injury. (*Reynolds v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 13, 248, 252; *Cordell v. N. Y. C. & H. R. R. Co.*, 64 id. 332; *Tolman v. S. B. & N. Y. R. R. Co.*, 98 id. 198, 202; *Hart v. H. R. Bridge Co.*, 80 id. 622; *Gonzales v. N. Y. & H. R. R. Co.*, 38 id. 440.) It was not shown, either directly or inferentially, by the circumstances that the deceased was free from negligence which contributed to the injury, and the refusal to nonsuit was error. (*Tolman v. S. B. & N. Y. R. R. Co.*, 98 N. Y. 202; *Cordell v. N. Y. C. & H. R. R. Co.*, 75 id. 333; *Gonzales v. N. Y. & H. R. R. Co.*, 38 id. 443; *Dubois v. Kingston*, 102 id. 219, 224; *Glendening v. Sharp*, 22 Hun, 78; *Kock v. Edgewater*, 14 id. 544; *Brucker v. Covington*, 69 Ind. 33; 35 Am. Rep. 202; *Parkhill v. Brighton*, 61 Ia. 103; *Wilkinson v. Fairie*, 32 L. J. Ex. 73; 1 H. & C. 633;

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Cummings v. Syracuse, 100 N. Y. 637; *Splitton v. New York*, 108 id. 205; *Reynolds v. N. Y. C. & H. R. R. Co.*, 58 id. 248, 252; *Wood v. Andes*, 11 Hun, 543; *Kenney v. N. Y. & M. B. R. R. Co.*, 13 Week. Dig. 61; *Van Horne v. B. H. T. & W. R. R. Co.*, 25 id. 268; *McLain v. Van Zandt*, 39 N. Y. Super. Ct. 347, 350; *Warner v. N. Y. C. R. R. Co.*, 44 N. Y. 465, 471; *Hart v. H. R. Bridge Co.*, 84 id. 56, 62, 63; *McMahon v. N. Y. E. R. R. Co.*, 18 J. & S. 507, 509, 510.) The plaintiff did not prove that the injury was caused solely by the negligence of the defendants, Smith & Davis. (Moak's Underhill on Torts, 232; *Odell v. Solomon*, 50 N. Y. Super. Ct. 119; 99 N. Y. 635, 637; *Edwards v. N. Y. & H. R. R. Co.*, 98 id. 245; *Wenzlich v. McCotter*, 87 id. 123; *Haggerty v. Thompson*, 45 Hun, 398; *Miller v. Church*, 2 T. & C. 260; *C. S. R. v. B. N. Y. & E. R. R. Co.*, 51 N. Y. 573, 581; *Jaffe v. Harteau*, 56 id. 398; *Irvine v. Wood*, 51 id. 224; *Clifford v. Dam*, 81 id. 56.)

Leroy Parker for Gustavus Bassett, appellant. Defendant's motion for a nonsuit should have been granted for the reason that no proof whatever was adduced to show that the deceased was free from negligence which contributed to the injury; and without such proof it was error to submit the case to the jury. (*Hartfield v. Roper*, 21 Wend. 620; *Wendell v. N. Y. C. & H. R. R. Co.*, 91 N. Y. 426; *Reynolds v. N. Y. C. & H. R. R. Co.*, 58 id. 248; *Cordell v. N. Y. C. & H. R. R. Co.*, 75 id. 332; *Hart v. H. R. Bridge Co.*, 80 id. 622; *Hall v. Smith*, 78 id. 483; *Lee v. T. C. G. L. Co.*, 98 id. 116; *Payne v. T. & B. R. R. Co.*, 83 id. 574; *Palmer v. Dewing*, 93 id. 11.) Where a man makes an excavation upon his own land, having a right so to do, and is guilty of negligence in the manner of its construction, or in not properly guarding it after it is constructed, in an action by a party injured he must show that the defendant has been guilty of negligence and that the plaintiff was free from fault. (*Sexton v. Zett*, 56 Barb. 119; affirmed 44 N. Y. 430; *Bellinger v. N. Y. C. R. R. Co.*, 23 id. 42; *Irvine v.*

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Wood, 51 id. 224; *Seldon v. D. & H. C. Co.*, 29 id. 634; *Radcliff v. Mayor, etc.*, 4 Coms. 195, 199; *Clifford v. Dam*, 81 N. Y. 52-56.)

Porter Norton for respondent. No particular kind or species of evidence is required to establish the absence of contributory negligence. (*Winslow v. B. & A. R. R. Co.*, 11 St. Rep. 834.) It is only in exceptional cases that the question can be taken from the jury. (*Halsey v. R. & W. R. R. Co.*, 12 St. Rep. 332; *Carr v. Man. R. Co.*, 22 Week. Dig. 322.) It must appear from the circumstances clearly that the party injured has by his own acts or neglect contributed to the injury before the case can be taken by the court from the jury. (*Massoth v. D. & H. C. Co.*, 64 N. Y. 529; *Justice v. Lang*, 52 id. 323; *Hart v. H. R. B. Co.*, 80 id. 623; *Lee v. Troy Citizens' Gas Co.*, 98 id. 116; *Stackus v. N. Y. C. R. R. Co.*, 79 id. 464, 468; *Jones v. N. Y. C. R. R. Co.*, 28 Hun, 367; 92 N. Y. 628; *Woodward v. N. Y. C. R. R. Co.*, 58 id. 451; *Payne v. B. A. R. R. Co.*, 83 id. 573, 574; *Beck v. Carter*, 68 id. 293; *Weed v. Village of Ballston Spa*, 76 id. 329; *Thomas v. Mayor, etc.*, 28 Hun, 111; *Evans v. City of Utica*, 69 N. Y. 166; *Bullock v. City of New York*, 99 id. 654; *Talman v. S. R. R. Co.*, 98 id. 203; *Johnson v. H. R. R. Co.*, 20 id. 65; *Schwandner v. Birge*, 33 Hun. 190; *Button v. H. R. R. Co.*, 18 N. Y. 252; *Wiley v. Mulledy*, 78 id. 310; *Hart v. H. R. R. R. Co.*, 80 id. 622; *Mahoney v. Buffalo*, 26 Hun, 240; 91 N. Y. 627; *Cassidy v. Angel*, 12 R. I. 447; *Wooley v. S. R. R. Co.*, 83 N. Y. 128; *Morrison v. N. Y. C. R. R. Co.*, 63 id. 643; *Sammon v. N. Y. & H. R. R. Co.*, 62 id. 255; *Shaw v. Jewett*, 86 id. 616; *Wharton on Ev.* § 1225; *Dorland v. N. Y. C. R. R. Co.*, 19 Week. Dig. 76; *McGuire v. Spence*, 91 N. Y. 305, 306; 68 id. 293; *Sher. & Redf. on Neg* 559; *Crogan v. Schiele*, 3 East. Rep. 799; *Carter v. Beck*, 6 Hun, 607; *Green v. E. R. Co.*, 11 id. 334; *Kenyon v. N. Y. C. & H. R. R. R. Co.*, 5 id. 479; *Totten v. Phipps*, 52 N. Y. 354, 358; *Roll v. N. Y. C. R. R. Co.*, 15 Hun, 496-502.) A duty was imposed

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on the defendant to protect the area, and for the neglect thereof he was liable. (*Beck v. Carter*, 68 N. Y. 291, 293; 6 Hun, 610; *Barnes v. Ward*, 9 C. B. 392; *Croghan v. Schiele*, 3 East. Rep. 807; *Bishop v. Trustees*, 28 L. J. [Q. B.] 215; *Vale v. Bliss*, 50 Barb. 364, 366; *Dillon on Mun. Corp.* [3d ed.] § 1033; *Fitzpatrick v. Reilly*, 16 State Rep. 736; *Irvine v. Wood*, 51 N. Y. 228; *Jennings v. Van Schaick*, 108 id. 530, 533; *Clifford v. Dam*, 81 id. 52; *Newcross v. Thomas*, 51 Me. 503; *Moak's Underhill on Torts*, rule 20, p. 229; *McGuire v. Spence*, 91 N. Y. 395.)

EARL, J. This action was brought to recover damages from the defendants on account of the death of plaintiff's intestate, caused by his falling into an open and unprotected area upon the premises of defendants just outside of Webster alley, in the city of Buffalo.

In September, 1884, the defendants, Smith & Davis, owned a lot twenty feet wide with a store thereon, occupied by defendant Bassett as their tenant, the front of which was on Main street and the rear thereof was upon the alley. The rear of the store came within about three feet of the westerly side of the alley, and the space between the store and the alley was occupied by the area, which was eight feet deep, extending the whole width of the lot. The area was entirely open, except a space of three feet and eight inches which was covered by a stone platform over the middle of the area used for entrance into a rear door of the store. The wall under defendants' store formed the westerly wall of the area, and the rear of the buildings northerly and southerly of defendants' lot came out flush with the alley, and thus their foundation walls formed the northerly and southerly walls of the area, and the easterly wall thereof was built of stone, no part of which was in the alley, and upon the top of which was a stone coping seven inches high above the alley and two feet wide. The alley is midway between and parallel with Main and Washington streets, and extends southerly from Seneca street 239 feet, is fifteen feet wide and has no opening or outlet at the

southerly end. On the night of September 16, 1884, the intestate was a watchman in the employment of a private detective agency, whose duty it was to go into the alley during the night and examine the doors and windows of certain buildings; and in the discharge of his duties, he entered the alley and fell into the area after twelve o'clock that night, and subsequently died of the injuries there received.

The defendants Smith & Davis contend that even if their tenant Bassett was not solely responsible for the condition of the area, and any injury which might be occasioned thereby, there was no negligence, wrong or fault in the construction or maintenance of the area which can impose responsibility upon them for this death.

This excavation was upon their own land, and was made there in the improvement of their lot for a purpose entirely proper. They had the right to make and maintain it, unless it was manifestly and obviously dangerous to persons lawfully using the alley with ordinary prudence and care. (*Barnes v. Ward*, 9 C. B. 392; *Beck v. Carter*, 68 N. Y. 283.)

We have seen what kind of an area this was. It was impossible for anyone passing along the street to walk into it, as it was protected on the northerly and southerly sides by the buildings extending to the alley. It was impossible for anyone to fall into it from the street without going over the stone coping seven inches high and two feet wide.

Now what kind of an alley was this? It was in some sense a public alley, and all people who chose to could enter therein. But being closed at one end it was not a thoroughfare, and in no proper sense was it a street for public travel. It was used only by persons having business with the rear ends of the buildings abutting upon the alley, and almost exclusively during business hours and in the daytime. It had no sidewalks, descended from both sides to the middle thereof, and was always much incumbered with barrels, boxes and other rubbish. Obviously, the persons who would use it would generally be such as had business there and were acquainted with its condition. As to such an alley, was this area, separated therefrom by a

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stone coping two feet wide and seven inches high, so imminently dangerous as to be a nuisance? The facts are undisputed, and there was not enough in them to warrant an inference by the jury that the area was a nuisance, or that the defendants were chargeable with any fault in the maintenance thereof. It is obvious that no harm could come from the existence of the area to a traveler in the alley except under extraordinary circumstances, and against extraordinary accidents the defendants were not bound to guard.

But if we assume that this area was in some sense a nuisance, and that the defendants were guilty of some fault for maintaining it, then, we think, the further contention of all the defendants is well founded, that the evidence fails to show that the intestate was himself free from carelessness, and that his death was due solely to the fault of the defendants. He fell into that portion of the area between the stone platform over the middle thereof and the northerly end thereof and he was found in the bottom of the area with his head towards the south. It is thus manifest that he did not fall off from the stone platform, and, indeed, he had no business to call him upon that. There is not the least evidence showing how the accident happened. When he was found and taken out he gave no account of it. He had been on duty in that alley previously during thirteen nights as follows: August 26, 28, 29, 30 and 31, and September 1, 2, 3, 4, 5, 6, 14 and 15, nine hours each night; and it was his duty to pass through the alley hourly for the purpose of examining the rear doors and windows of five buildings, all on the westerly side of the alley. He was thus perfectly familiar with the alley and must have passed this area more than two hundred times during those nights. Every hour during those nights it was his duty to inspect the next store but one north of the defendants' store, and also the store immediately south of it. As those stores to which his duty called him came out flush with the alley, and the store of the defendants, four stories high, was back three feet from the alley, he must always have been able to determine where that store was, and where the stores to be inspected by

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him were, even in a dark night. The alley was not lighted on that night, and as all the buildings were from four to six stories high, it must have been dark. But the darkness was obvious and the danger was known, and hence caution and care were demanded of the intestate. How, then, did the accident happen? How came he to fall over this stone coping into this known place of danger? The evidence does not tell us. It is an unsolved mystery. No plausible theory can be suggested to account for it. It is, however, plain that he could not have fallen into it while passing along the street. He must have departed from the street and thus have gone over the stone coping. It is impossible to conceive how he could, when in the exercise of ordinary care and prudence, have fallen into it. We have no right to guess that he was free from fault; it was incumbent upon the plaintiff to show it by a preponderance of evidence. She furnished the jury with nothing from which they could infer the freedom of the intestate from fault. She simply furnished them food for speculation, and that will not do for the basis of a verdict. The law demands proof, and not mere surmises. The authorities are ample to show in such a case the plaintiff should have been nonsuited. (*Cordell v. N. Y. C. & H. R. R. Co.*, 75 N. Y. 330; *Dubois v. City of Kingston*, 102 id. 219.)

We are, therefore, of opinion that the judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except DANFORTH, J., not voting; RUGER, Ch. J., concurring in result.

Judgment reversed.

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EUGENE E. LEWIS, as Executor, etc., Respondent, v. ENOS MERRITT, APPELLANT.

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In an action by an executor to recover damages for the alleged conversion of certain promissory notes, it was conceded that the notes, before the death of plaintiff's testatrix, belonged to her, and that thereafter defendant had possession of them. The issue was as to whether she gave them to him or whether he wrongfully became possessed thereof. Plaintiff, as a witness in his own behalf, testified that a few hours before the death of decedent, when she was in an unconscious state, which continued until her death, he saw the notes in her trunk; that just after her death he looked again and they were gone, and that defendant was in the house and had an opportunity to take them. Defendant, as a witness in his own behalf, was permitted to testify that he had possession of the notes a week before the death of deceased, and that they were in his possession when the executor testified he saw them in the trunk; he was then asked: "Did you take them (the notes) from any person without their consent?" This was objected to as incompetent, under the Code of Civil Procedure (§ 829), and was excluded. *Held*, that if the ruling was erroneous, as the testimony was only proper in rebuttal, not to establish an affirmative defense, and as defendant, if believed, had already thoroughly and perfectly rebutted plaintiff's evidence, the error did not justify a reversal.

It seems that plaintiff's testimony tended to establish that there had been no personal transaction between deceased and defendant by which his possession could have been rightful, and it was thereby made competent for defendant to testify that he took the notes with her consent, and so rightfully.

The court, in submitting the question as to whether there was a gift as claimed by defendant, charged repeatedly that such a gift must be proved "beyond suspicion." *Held*, error.

While the proof to establish an alleged gift *causa mortis* must be clear and convincing, it is not correct to charge the jury that the presumptions of law are against it, or that the fact of the gift must be proved beyond suspicion.

Reported on a former appeal, 98 N. Y. 206.

Grey v. Grey (47 N. Y. 552) distinguished and limited.

Lewis v. Merritt (42 Hun, 161) reversed.

(Argued March 26, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 22, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

Statement of case.

This action was brought by plaintiff, as executor of the will of Charlotte J. Lewis, to recover damages for the alleged conversion of certain promissory notes belonging to the estate.

The facts, so far as material, are stated in the opinion.

D. Morris for appellant. The tortious taking alleged in the complaint was not proved. (*Poucher v. Scott*, 98 N. Y. 422; 33 id. 581.) The defendant is a competent witness to reply to and disprove the testimony of the plaintiff, as fully as if he were not a party. Not affirmative evidence, but in reply. (*Sweet v. Low*, 28 Hun, 432; 18 id. 319; *Markell v. Benson*, 55 How. 360; *Lewis v. Merritt*, 98 N. Y. 206; *Pinney v. Orth*, 88 id. 447.) The judge erred in his charge to the jury, that: "When a gift is alleged the presumptions are against it, and clear proof on the part of the claimant is required; it must be established beyond suspicion." (1 Bouvier, 278; *Bedell v. Carll*, 33 N. Y. 581, 585; *Champeney v. Blanchard*, 39 id. 111, 116; *Throw v. Shannon*, 78 id. 446; *Gray v. Gray*, 47 id. 552; *Walter v. Hodge*, 2 Swanston, 97; 2 Kent [8th ed.] 444; *Cantant v. Schuyler*, 1 Peige, 316.)

Charles S. Baker for respondent. Every presumption is to be taken against the defendant, and the clearest proofs are required on the part of the defendant to uphold the transaction. (*Gray v. Gray*, 47 N. Y. 552, 555, 557; *Kenney v. Public Administrator*, 2 Bradf. 319; *Nesbitt v. Lockman*, 34 N. Y. 167, 169; *Harris v. Clark*, 3 id. 93, 121; *Holcomb v. Holcomb*, 95 id. 316, 326.) If the evidence, offered by defendant and excluded, was of a negative and not affirmative character, it would still be excluded. (*Clarks v. Smith*, 46 Barb. 30; *Dyer v. Dyer*, 48 id. 190; *Stanley v. Whitney*, 47 id. 586; *Hill v. Heermans*, 17 Hun, 470; *Gray v. Gray*, 47 N. Y. 552, 554.) It involved a personal transaction or communication with the deceased under section 829 of the Code. (*Wadsworth v. Heermans*, 85 N. Y. 639, 640; *Wheeler v. Kurtz*, 9 N. Y. State Rep. 496, 497; *Hill v. Heermans*, 17 Hun, 470;

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Stuart v. Patterson, 37 id. 113; *Tooley v. Bacon*, 70 N. Y. 34, 36, 37; *Waver v. Waver*, 15 Hun, 277; *Koehler v. Adler*, 91 N. Y. 657; *Holcomb v. Holcomb*, 95 id. 316, 325, 326; *Chadwick v. Tomer*, 69 id. 404, 407, 408; *Corning v. Walker*, 100 id. 551; *Campbell v. Hubbard*, 38 Hun, 306; *Pinney v. Orth*, 88 N. Y. 447; *Gray v. Gray*, 47 id. 552, 554; *Lewis v. Merritt*, 98 id. 206.) The charge that the gift must be proved beyond suspicion, under the peculiar and extraordinary facts and circumstances existing in the case, cannot be questioned. (*Gray v. Gray*, 47 N. Y. 552, 555, 556; *Kenney v. Public Administrator*, 2 Bradf. 319; *Harris v. Clark*, 3 N. Y. 93, 121; *Nesbitt v. Lockman*, 34 id. 167, 169.)

FINCH, J. This case was tried, so far as evidence was admitted or rejected, under objections founded upon section 829 of the Code, substantially in accordance with our opinion rendered in the same case upon a previous appeal, except, possibly, as to a single inquiry. We then held that the question put to the defendant, and excluded, whether he took the notes "from any trunk or any person," was a competent and proper inquiry, mainly because it served to answer and contradict the evidence of the executor and the inferences which that evidence tended to establish. On this trial the defendant was asked the same question in a modified form, and his answer was excluded. That question was: "Did you take them" — the notes — "from any person *without their consent?*" The action was brought and defended upon the conceded fact that defendant had possession of the notes. That before her death they belonged to deceased was another conceded fact. Whether they passed to defendant rightfully because with her assent, or wrongfully because without her assent, was the precise issue between the parties. Now, the executor testified that a few hours before the death of deceased, and when she was in an insensible state, which never improved, he saw these notes in her tin trunk; that just after her death he looked again, and they were gone; and that defendant was in the house that night and had

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opportunity to take them. The direct inference from this proof was that defendant wrongfully took the notes without the knowledge or consent of the owner, and it tended to establish that there had been no personal transaction between such owner and the defendant by force of which his possession could have been rightful and honest. The executor was, therefore, examined as to a personal transaction with the deceased by the defendant; that is, he negatived the existence of any such transaction. In answer, the defendant was permitted to affirm its possibility by the terms of the Code. This he could do, both directly and indirectly. He was permitted to swear that he had possession of the notes a week before the death of deceased, and that when the executor professed to have found them in the trunk, they were, in fact, not there, but in defendant's possession. If this evidence was true, it directly contradicted the executor as to his facts, and indirectly as to his inference of a wrongful taking. But was defendant confined to that indirect rebuttal of the inference? Had he not the right to meet it directly, and say that his possession, concededly derived from deceased if the notes were not stolen, was rightfully obtained because with her consent? If the executor, it is asked, could swear as he did, through the medium of the inference he established, that defendant took the notes without the consent of the deceased, and so, wrongfully, why may not the defendant rebut the inference by saying that he took the notes with her consent, and so, rightfully. The answer is that the executor swore to independent facts tending to show that the personal transaction in issue was impossible, and defendant was at liberty to contradict those facts and remove that impossibility. That he was fully permitted to do, but not allowed to go further and swear that such personal transaction was not only possible, but did, in truth, actually take place. In any event the excluded evidence would have added little to his contradiction of the executor, for, if he was believed, he had already thoroughly and perfectly rebutted the plaintiff's evidence, and the further proof was needless in rebuttal

and only useful to establish an affirmative defense, for which purpose, as we held on the former appeal, it was not available. We ought not to reverse the judgment upon that ground.

But there was an error in the charge of the court to the jury which is too serious to be overlooked. The question submitted to them was one of gift. The evidence demonstrated that the notes were either wrongfully taken, or were given by deceased to the defendant. The latter was his ground of defense, and he gave evidence tending to prove it. In submitting the question to the jury whether there was such a gift to the defendant the learned judge laid down the rule that a gift must be proved "beyond suspicion," and reiterated the statement until it became the one prominent feature of the charge. The rule was not confined to a gift *causa mortis* in terms, but may fairly be so regarded under the circumstances of the trial. I do not know of anything which is required to be proved beyond suspicion. If there is anything, that particular fact can never be proved at all, for suspicion may exist wholly without evidence, in opposition to the most clear and cogent proof, and may remain after even the last reasonable doubt is removed. It may be founded upon the mere personal appearance of the party or witnesses, upon something in their manner, real or imagined, or even upon nothing except a suspicious temperament of the observer. It is amenable to no rules, it perverts simple and harmless actions, and sees mischief where none exists. To put such a standard before a jury is to take away all measurement of or control over the volume of proof required, and leave the verdict to an irresponsible and undiscoverable impulse. When it was said in *Grey v. Grey* (47 N. Y. 552) that a gift *mortis causa* must be proved beyond suspicion, the meaning of the learned judge was entirely plain and ought not to be misapprehended. It was a passing remark and very briefly phrased, and obviously meant that circumstances legitimately raising a suspicion of fraud or wrong must be explained away. The same judge, in *Grymes v. Hone* (49 N. Y. 17), upheld such a gift, saying: "As there is great

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danger of fraud in this sort of gift, courts cannot be too cautious in requiring clear proof of the transaction. This has been the rule from the early days of the civil law (which required five witnesses to such a gift) down to the present time:" and he added, as to the case before him, "the proof of the assignment is entirely clear." Undoubtedly in such cases the proof must be clear and convincing, and strong and satisfactory, but it is not correct to say that the presumptions of law are *against* a gift as the learned judge charged, although it is true that the law does not presume in its favor, but requires clear and convincing proof; nor was it proper to say to the jury that the fact of a gift must be proved beyond suspicion.

For this error the judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

WILLIAM J. HILL et al., as Executors, etc., Respondents, v.
CHARLES L. WOOLSEY et al., Appellants..

In an action against sureties for the tenants upon a lease of certain hotel property, brought by McD., the landlord, but continued after his decease by his executors, the defense was that defendants were induced to become sureties by reason of certain false and fraudulent representations made by decedent to them. On the trial defendants proved that when the tenants came to defendant W. and asked him to become a surety, he requested them to go to McD. and make certain inquiries as to the business done at the hotel, so that he might judge as to the propriety of his consenting to become a surety; that they went with another of the sureties and a third person and that McD. made to them the representations set forth in the answer. Defendant W. and one of the tenants were then called as witnesses for the defense and were asked as to what was said to W. on the tenant's return from the interview with McD. This was objected to and excluded as incompetent under the Code of Civil Procedure (§ 829.) *Held*, error; that, conceding the testimony was incompetent to prove what representations were, in fact, made by McD., as defendants were bound to prove, in addition to this, that the representations were communicated to them and that they were thereby induced to become sureties, having proved by a competent witness what repre-

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sentations were made, it was competent to prove by the witnesses called that they were communicated to W.; that this was not a personal conversation with deceased.

Hill v. Woolsey (42 Hun, 481), reversed.

(Argued March 26, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 14, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

The nature of the action and the material facts are stated in the opinion.

William J. Gaynor for appellants. The proposed testimony of Woolsey was not to prove "a personal transaction or communication" between him and the deceased plaintiff; it was only to prove the fact that such a communication was made and should have been received. (*Robbins v. Richards*, 2 Bosw. 248; 1 Greenl. on Ev. §§ 100, 101; *Wadsworth v. Heermans*, 85 N. Y. 638; *Potts v. Mayer*, 86 id. 302; Code of Civ. Pro. §§ 828, 829; Alb. L. Jour. [Jan. 5, 1889] 5; *Pinney v. Orth*, 88 N. Y. 447-451.)

Nathaniel C. Moak for respondents. Although Wise might be so far Woolsey's agent that, as such merely, he might be allowed to testify, yet, as he also embodied the additional or dual character of a party, a principal to the hiring, if his character as agent of Woolsey would not prevent his testifying, his character as a principal and party to the hiring would. (*In re Hopkins*, 6 N. Y. State Rep. 390, 392; 43 Hun, 637.) The true test of the interest of a witness is, that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. (*Hobart v. Hobart*, 62 N. Y. 83; *Miller v. Montgomery*, 78 id. 282, 285; *Wilcox v. Smith*, 26 Barb. 316; *Church v. Howard*, 79 N. Y. 415, 420; *Hill v. Hotchkiss*, 23 Hun, 414; *Larson v. Sayles*, 40 id. 252, 255; *Redfield v. Redfield*, 110 N. Y. 671, 674.) A principal debtor is bound by an adjudication in a suit against his surety if he

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had notice thereof. (*Craig v. Ward*, 31 Barb. 383; *Delaware Bank v. Jarvis*, 20 N. Y. 227; *Castle v. Noyes*, 14 id. 332, 335; 2 Greenl. on Ev. § 116.) And he has a sufficient notice thereof to bind him if he be sworn on the trial thereof as a witness. (*Barney v. Dewey*, 13 Johns. 224, 226; *Brewster v. Countryman*, 12 Wend. 450; *Howe v. Buffalo*, 38 Barb. 126; *Chicago v. Robbins*, 2 Black [U. S.] 418, 423; *Robbins v. Chicago*, 4 Wall. 657, 672-675.) The question put to Skinner, "Before you signed as surety were the representations communicated to you?" was properly excluded. (*Williams v. Davis*, 7 Civ. Pro. 282; *Bristol v. Sears*, 3 id. 330. 331.)

PECKHAM, J. This action was brought by plaintiffs' decedent (who died prior to the trial), to recover the amount alleged to be due him for rent on a lease of a hotel which he had leased to two men named Wise and Carpenter, and for the payment of the rent of which premises the defendants became sureties. The defendants answered the complaint and alleged that the plaintiffs' decedent had induced them to sign as sureties for the tenants by reason of certain false and fraudulent representations made to them by him, and that as soon as the fraud and the falsity of the representations were discovered the possession of the premises which had been taken by the tenants was tendered and delivered up to him. Upon the trial it appeared that the tenants came to one of the defendants (Woolsey), and asked him to become one of the sureties on the lease. He asked them to go to the plaintiffs' decedent and make certain inquiries of him as to the business done at the hotel the year previous, so that he might judge therefrom of the propriety of his consenting to go on as one of such sureties. They then went in company with a man named Douglass and with another of the proposed sureties on the lease, and saw the plaintiffs' decedent and asked him the questions they were directed to ask by Woolsey. The conversation that then took place between them upon the subject, which they were instructed by Woolsey to

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inquire concerning, was proved by the witness Douglass, and was of the tenor and effect alleged in the defendants' answer. The tenants after the conclusion of the conversation came back to see defendant Woolsey, and he and one of the tenants were sworn on the trial and were asked what was said to Woolsey upon the tenants' return from the interview with the plaintiffs' decedent. This was objected to by counsel for plaintiffs on the ground that the death of McDonald, rendered such evidence inadmissible under section 829 of the Code; the objection was held valid, the court holding that the persons sent by Woolsey to get the facts from McDonald were the agents of Woolsey, and when they came back to report the conversation it was just as much a personal conversation as if Woolsey had had it himself. We think the learned judge erred in excluding the evidence. It may be assumed, without deciding, that the evidence was incompetent for the purpose of proving or attempting to prove what representations or statements were, in fact, made by McDonald. But the defendants, in order to make out their defense, had to prove several facts, and each fact was a separate and material one for such defense. The defendants had to prove that certain representations were made by McDonald for the purpose of being communicated to them, and to induce them to become sureties; that such representations were communicated to them; that they were thereby induced to sign the undertaking of suretyship; that they were false and known so to be by the party uttering them, and that defendants would sustain damages thereby if held upon the undertaking thus fraudulently procured. All of these facts were of such a nature that they could ordinarily be proved by one or any number of witnesses cognizant of the facts. For the purpose of proving what the representations were, and that they were made to be repeated to defendants, the witness Douglass was called and swore to them plainly and fully. For the purpose of proving the knowledge of the defendants the offer was made to prove what it was that the tenants told Woolsey upon their return from the interview with McDonald.

We think it was competent for the purpose of showing Woolsey's knowledge. If, when the evidence was given, it then appeared that what Woolsey was told was not the same in substance as Douglass testified that McDonald had said, then the defendants would have failed in showing any knowledge on their part of any representations made by McDonald, and they would, consequently, have failed in their defense. On the contrary, if what the tenants said to Woolsey agreed with what Douglass proved was said by McDonald, then the separate and distinct fact of knowledge on the part of Woolsey, of such representations, would have been proved, and the further fact that he was induced, by reason of a knowledge of such representations, to sign the undertaking as one of the sureties on the lease, might have been proved by the evidence of Woolsey himself. Suppose Douglass alone had heard McDonald's representations, but had not informed the defendants personally in regard thereto, and had repeated to a third party what had been said by McDonald, and the third party had come to defendant Woolsey, would it not have been proper to prove by the third party what it was that he told Woolsey; and if it thus appeared that he told Woolsey exactly what McDonald had told Douglass, would not such evidence have been proper? It would have been no proof whatever of what McDonald had, in truth, told Douglass, but if Douglass proved what McDonald did tell him, and if the third party told Woolsey just what McDonald had told Douglass, there would then have been evidence as to what representations were, in truth, made, and their purpose, and also evidence as to the knowledge of Woolsey in reference to them.

We think the evidence was admissible in the present case for just that purpose, even though testified to by a witness who was not competent to prove, as an original fact, what McDonald had said. Upon this ground the evidence was improperly excluded, and the consequent direction of a verdict for the plaintiffs was also error.

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The judgments of the courts below should, therefore, be reversed, and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

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In the Matter of the Final Judicial Settlement of the
Accounts of SAMUEL R. WELLS, as Executor, etc.

The will of C. gave one-eighth of her residuary estate to each of five persons named, "to have and to hold the same to them, their heirs and assigns, forever." Four of the beneficiaries died before the testatrix. She left neither parent nor descendant. The entire estate had come to the testatrix from her deceased husband; the five persons so named were his brothers and sisters, the balance of the residuary estate was given, one-eighth to the children of each of two brothers and a sister, deceased. In other clauses of the will provision was made that in case of the pre-decease of a donee his descendants should take. *Held*, that the gifts to the four deceased beneficiaries lapsed; that the addition of the word "heirs" did not show a contrary intent; and that, as the words of the will were clear and unambiguous, the extrinsic circumstances could not properly be resorted to to change or modify that meaning.

The rule of the common law that a legacy or devise, given with or without words of limitation, lapses in case of the death of the devisee or legatee before the testator, in the absence of express words to prevent a lapse, or of something in the context of the will indicating a contrary intent, is still in force in this state, save so far as modified by the Revised Statutes (2 R. S. 66, § 52), i. e., where the devise or bequest is to a child or descendant of the testator.

The fact that words of inheritance are now unnecessary to convey a fee does not justify the construction that their use in a will is expressive of an intention that they shall be taken as words substituting in place of a pre-deceased legatee or devisee, his heirs; having a well settled and understood meaning, a different meaning may not be given to the words.

In re Brown (93 N. Y. 295) distinguished.

(Argued March 26, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made April 14, 1888, which affirmed a decree of the surrogate

Statement of case.

of the county of Seneca on final settlement of the accounts of Samuel B. Wells, as sole executor of the will of Eunice B. Cooke, deceased.

The facts, so far as material, appear in the opinion.

Edward M. Shepard for appellant. The general rule of construing a will, or any other written paper, is, if it can be done without violating the intent, to give a meaning to all the words which are used. (3 Jar. [Ran. & T.'s ed.] 705; *Dover v. Gregory*, 10 Sim. 399; 1 Redf. on Wills [4th ed.] 430; *Lytle v. Beveridge*, 58 N. Y. 598; *Phillips v. Davis*, 92 id. 199, 204; *Chapman v. Brown*, 3 Burr. 1626.) In order to carry out the intent of the testator, the words of a will will be wrested from their usual and grammatical meaning, especially to save a general benefit intended for all the branches of a family. (*Teed v. Morton*, 60 N. Y. 502; *Sibthorn v. Moxon*, 3 Atk. 580; *In re Cranford*, 10 N. Y. S. R. 423; *Patchin v. Patchin*, 1 N. Y. Supplement, 913; *Rivernett v. Borquin*, 53 Mich. 10.) It is the duty of the court to ascertain from the frame-work of this will, and the circumstances of the testatrix, what the words "to have and to hold the same to them, their heirs and assigns forever," meant to Mrs. Cooke when she used them. (*In re Brown*, 295, 300; *Deu v. Mannors*, 20 N. J. L. 142; *Hawn v. Banks*, 4 Edw. Ch. 664; *Davis v. Taul*, 6 Dana, 51; *In re Bond*, 31 Conn. 183; *Sibley v. Cook*, 3 Atk. 572.) If the appellants venture to presume that the expression "to have and to hold the same to them, their heirs and assigns" had been disjunctively put, "to have and to hold the same to them or their heirs or assigns," the decision below must have been different. (*Taggart v. Murray*, 53 N. Y. 233; *Gittings v. McDermott*, 2 M. & K. 69; *In re Stannard v. Burt*, L. J., 52 Ch. Div. 355; *Jones v. Tobin*, 6 Sim. 255; *Girdlestone v. Doe*, 2 id. 225.)

Charles A. Hawley for respondents. If a fund be given to several by name or in shares to be divided among them in equal parts, if any one of them dies before the testatrix

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his share will lapse, for such legatees take as tenants in common, and not jointly. (*Everett v. Everett*, 29 N. Y. 39; *Downing v. Marshall*, 23 id. 367; *Westcott v. Cady*, 5 Johns. Ch. 358; *Weymans v. Ringgold*, 1 Bradf. 43; 3 Jarman on Wills [R. & T.] 1-8, 704; *Van Buren v. Dash*, 30 N. Y. 393; *In re Benson*, 96 id. 490; 1 Bouv. Law Dict. Est. of Joint Tenancy; 1 Schouler's Pers. Prop. 188; 2 Bl. Com. 183; 4 Kent, 359, 360 n.; 1 Wash. on Real Prop. 403; *Chamberlain v. Taylor*, 105 N. Y. 193.) As a general proposition, a lapsed legacy or devise falls into the residuum, but where the lapse occurs in the bequest or devise of the residuum itself, the lapsed bequest or devise goes to the next of kin or heirs-at-law as property undisposed of by the will. (*Heart v. Marks*, 4 Bradf. 161; *In re Benson*, 96 N. Y. 499; *Hillis v. Hillis*, 16 Hun, 46; *Kerr v. Dougherty*, 79 N. Y. 349; *White v. Howard*, 45 id. 144, 168.) At common law, unless the legatee or devisee survive the testator, the legacy or devise is extinguished. It "lapses," and neither the heir of the devisee nor the executor, administrator or next of kin of the legatee can claim it. (Willard on Exrs. 355; Redfield's Sur. Pr. 574; Willard's Eq. Jur. [Potter's ed.] 508; 1 Jarman on Wills, chap. 11; *Chrystie v. Phylfe*, 22 Barb. 220; *Bishop v. Bishop*, 4 Hill, 168; *Armstrong v. Moran*, 4 Bradf. 314; *Vernon v. Vernon*, 53 N. Y. 351; *Downing v. Marshall*, 23 id. 370; *Van Beuren v. Dash*, 30 id. 393; *Thurber v. Chambers*, 4 Hun, 725; *Gill v. Brower*, 38 N. Y. 549.) A lapse may be prevented by the testator by a suitable provision in his will, but his intention cannot be proved by evidence *de hors* the will. (Willard on Exrs. 354; *Arcularius v. Giesenhainer*, 3 Bradf. 64; *Sweet v. Giesenhainer*, 3 id. 114; 1 Jarman on Wills [R. & T.] 620, note 3; *Hone v. Schaick*, 3 N. Y. 539; *Mann v. Mann*, 14 Johns. 1; *Cromer v. Pinckney*, 3 Barb. Ch. 463; *In re Chappeaux*, 1 Tuck. 417; *Comfort v. Mather*, 3 Watts & Serg. 450.)

GRAY, J. The testatrix, after making a devise of certain real estate and certain bequests, by the tenth clause of her will,

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disposed of all of the rest, residue and remainder of her estate, by giving one eighth part thereof to each of five persons named and one eighth part to the children of each of three other persons. After stating the legatee, or legatees of each eighth part, testatrix added these words: "*To have and to hold the same to them, their heirs and assigns forever.*" Four of the persons named as legatees died after the making of the will and before the testatrix, and this controversy arose as to whether the legacies to them lapsed, and whether as to such parts the testatrix has died intestate. The appellants, who are the heirs and representatives of the deceased legatees, argue that there was no lapse, and they found their argument upon the habendum clause, just quoted from the will, and upon what they deem to be evidences of a contrary intention of the testatrix. That evidence they glean entirely through a consideration of certain extrinsic circumstances. The estate of the testatrix had come entirely from her deceased husband, with whom she had lived some forty-five years. She died at an advanced age, leaving neither parent nor descendant, and the persons, whom she selected as her residuary legatees, were all the next of kin of her deceased husband; being his brothers and sisters, and the children of two brothers and of a sister, deceased.

Those facts are relied upon by the appellants, when considered together, as constituting some evidence of an intention of the testatrix to treat the bulk of her estate as a moral trust from her husband and to return it to his relatives. They then argue that, reading in that light the words "*To have and to hold to them, their heirs and assigns forever,*" a force and significance are imparted to them, which, generally, they would not possess. They say that they must be taken to have been meant by the testatrix to be operative as substitutional words, whereby the heirs of any person entitled will, upon his death, stand in his place.

We cannot, however, concede to these words the meaning contended for. The established principles of construction, in such cases, forbid it. In the absence of express words to pre-

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vent a lapse, or of something in the context to indicate a contrary intention, we should give to the words in this habendum clause their usual and primary meaning, in accordance with a general rule in the construction of wills. At common law, a legacy or a devise lapsed and became void, where a legatee or devisee failed to survive the testator. The reason for the rule was that a will, in its nature, is ambulatory, and does not become operative until the death of the testator, and, until that event, the legacy has never vested. (1 Jarman, 338; 2 Wms. on Exrs. 1084.) In *Corbyn v. French* (4 Ves. 418, 435) the master of the rolls (Lord ALVANLEY) said: "A testator is never to be supposed to mean to give to any but those who shall survive him, unless the intention is perfectly clear." Such an intention cannot be said to be made clear by the addition of the word "heirs;" for that is a word of limitation, used to describe the nature and duration of the estate given, and, as Mr. Jarman observes in his valuable work (vol. 1, chap. 11), the doctrine of lapse "applies indiscriminately to gifts with and without words of limitation." This rule of the common law, with respect to the lapsing of a legacy or devise, was not abrogated, but it was modified, by the Revised Statutes of New York, to this extent, that where the devise or bequest is to a child or descendant of the testator, who dies in his lifetime, leaving a descendant, who survives the testator, the estate or interest given vests in the descendant of the legatee or devisee. (2 R. S. 66, § 52; *Downing v. Marshall*, 23 N. Y. 366.) It is apparent that the statute assumes that, but for its provisions, the devises or legacies, in the case of the pre-decease of the devisee or legatee, would have lapsed. Words of inheritance are now unnecessary to convey a fee, and are, indeed, mere surplusage, whether when used in wills or in deeds. That fact, however, is not a sufficient reason for us to import into their use the expression of an intention that they shall be taken as words substituting in place of the pre-deceased legatee or devisee his heirs. Where words like these have a well-settled and well-understood meaning, we should not invest them with a different one, unless we are forced to do so by a conviction, based

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on some stronger support than that which is afforded by suggestion or speculation, however plausible.

Some evidence of extrinsic circumstances was admitted, and I have referred to the evidence above; but that is as inconclusive, as it seems to be improperly in the case. If there was room for the belief that there was some obscurity in the language; if the meaning of the words used was ambiguous or obscure, and, from the facts proved, an ambiguity was disclosed, evidence of circumstances, or of declarations, might find a proper place in the case, to remove the obscurity, or to give an effect to the ambiguous expressions. (*Hiscock v. Hiscock*, 5 M. & W. 363.) Lord ABINGER, in the case cited, said, that to ascertain the intention of the testator we should "read his will as he has written it and collect his intention from his words." Mr. Wigram, in his work on Wills, says that the legitimate purposes, to which evidence of material facts is applicable, are, "first, to determine whether the words of a will, with reference to the facts, admit of being construed in their primary sense; and, secondly, if the facts of the case exclude the primary meaning of the words, to determine whether the intention of the testator is certain in any other sense of which the words, with reference to the facts, are capable." (O'Hara's ed. [2d Am. ed.] 285.) The rule is undoubted that evidence is admissible, in aid of the exposition of a will, in all cases where, from some ambiguity or obscurity, a difficulty arises in applying the words of a will to the subject-matter of a devise. In the will before us I can perceive no obscurity in its language, nor doubtful meaning of the words used, and the admission of the extrinsic evidence does not introduce any difficulty, or ambiguity in the case, or prevent us from applying the words of the habendum clause in their ordinary and primary sense.

There is no real reason, arising from anything in the structure of this will, why we should suppose that the testatrix meant anything more than what she has said. We must take the whole structure of the will together, and not dismember

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it, to discover what it accomplishes, and what it was meant to accomplish. We may assume, indeed, that the testatrix was aware of the effect of the pre-decease of a legatee; for we find, in the third clause of her will, in the case of a gift to her nephew, Nathan Crary, a provision that "in case he shall die before the receipt of said legacy, then the same shall go and be paid to his children," etc. Evidence of a similar understanding of the effect of the death of a legatee is suggested by the reading of the language of the third clause of the codicil.

How can it be fairly argued, then, that a reason exists that the words in question, which possess a certain meaning, should be read in another than their ordinary sense? Is it because the testatrix ought morally, and, therefore, must be held to have intended, to convey the bulk of her estate to the relatives of her deceased husband? That is a sentimental reason and it may explain as much as she did. But it cannot warrant our importing into her will another intention, which not only lacks support in expression, but may not, in fact, have been her intention; when we consider the fact that, in other cases of gifts, she has contemplated the effect of a possible pre-decease of the devisee and has provided for its occurrence, so as to perpetuate them in the descendants of the donee. The words of this clause are most inapt to signify substitution. To give to them such a sense, we should have to disregard and cut out such words as "to have and to hold" and "assigns," and interpolate others. They are meaningless, if the clause is to be regarded as substitutional. No gift can vest in the donee until the death of testatrix. What, then, is the sense of "to have and to hold" or of "assigns?" There are cases where words, accompanying a gift to a person of a legacy or devise, are deemed disjunctive, and, therefore, substitutional; or they may be explanatory, and, with the aid of the context, plainly indicate that the gift shall not become void by the death of the first taker named in the will before the testator. (*Gittings v. McDermott*, 2 M. & K. 65; *Hawon v. Banks*, 4 Edw. Ch. 664.) Whenever a testamentary intention is clear

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and unequivocal, the courts go far to give it effect. They will convert "and" into "or," and construe words of limitation as words of purchase, or words of purchase as words of limitation. (*Taggart v. Murray*, 53 N. Y. 233.) Such was the case in *Matter of the Estate of Brown* (93 N. Y. 295), where the court sustained a construction, by which the issue of a deceased son might be admitted to participation in a remainder limited to him upon his mother's death. But there was justification for such a construction in the language used by the testator. It was "upon the death of any or either of my said daughters, I give * * * unto such child or children as my said daughter *shall have or leave living at her decease*. * * * that is to say, *the children* of my said daughters to have the part or share whereof the mother received the rent and income during her life." It was thought that the insertion of the words "have or leave," with respect to the daughter's children, and that the addition of the latter portion of the clause I have quoted, when taken in connection with the principal sentence, disclosed the testator's purpose to let in the issue of children dying before their mother, testator's child.

The decision in *Van Beuren v. Dash* (30 N. Y. 393), is a precise authority upon the question raised in the present case, and we see no substantial distinction between the two cases. There the insertion of the words "and their heirs," in a devise, was held to show the extent of the interest devised; and DENIO, J., answered the argument that the devise was one in favor of the heirs of the devisees by reference to the case of *Brett v. Rigden* (Plowden, 340), and to its being the accepted authority in England. He also said: "It does not follow that because such words may now be dispensed with that, where they are inserted, their legal effect is different from what it would have been before the statute." In *Thurber v. Chambers* (66 N. Y. 47) it was said of the presence of similar words in a will, that "although the use of them was unnecessary to vest a fee, it is quite common and the usual way in deeds and conveyances to insert them for greater certainty." In *Hand*

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v. *Marcy* (28 N. J. Eq. 59) Chancellor RUNYON, in a well considered opinion, held that the addition of the words "their heirs and assigns" to a gift of the residue did not prevent a lapse, where a residuary legatee died in the lifetime of the testator, and that, as to so much of the estate disposed of by the residuary clause, the testator had died intestate. *Swan v. Adams* (3 Yeates, 34); *Sloan v. Hause* (2 Rawle, 28) are also decisions in point. Other authorities might be cited to show the universality of the rule as to lapse in similar cases, but it does not seem necessary. I think the appeal must fail. To sustain it we should have to make a new will; when we have no sure guide and no other reason than the ingenious suggestion of a possible motive, or rather of one, which, the counsel says, the testatrix ought to have entertained. Fairly considered, these words, which have suggested to the appellants their ground for contention, were but a common, or an intensified form of expression of an absolute gift. It was an expression consistent with the gift of an absolute ownership, but in no wise indicative of a direction to transfer the part given to a legatee to his heirs or personal representatives, in the event of his failing to survive the testatrix.

The judgment of the General Term should be affirmed, with costs to the respondents, to be paid out of the estate

All concur.

Judgment affirmed.

Statement of case.

LEWIS S. GOEBEL et al., as Executors, etc., Appellants, v.
CAROLINE WOLF, Respondent, and MARY FROELICH et al.,
Appellants.

The will of T. gave his residuary estate to trustees in trust, to pay one-half of the net profits and income of the real estate to the testator's wife, for the support and maintenance of herself and the testator's minor children, and to apply the other half in payment of mortgages upon the real estate, and after such payment to invest the residue for the benefit of his children. The trustees were authorized to take charge of the testator's store, stock in trade, etc., to continue the business until the youngest child should arrive of age, and invest the net proceeds; also to sell the personal estate, convert it into money and invest the same for the benefit of his children. Then, after providing for an advancement to each of his children when they respectively arrive of age or marry, the clause continued thus: "Immediately upon the arrival of my youngest child at the age of twenty-one years, in case my said wife shall not then be living, to divide all my estate, real and personal, and the accumulations of interest equally among my children, share and share alike, after deducting all advances made as above provided to any of my children, so that each of my children shall have and receive an equal share of my estate." In an action to obtain a judicial construction of the will, it appeared that one of four infant children living at the time of the testator's death had since died under age and without issue. *Held*, that the gift was not to the children as a class, but each took a vested remainder in one-fourth of the residuary estate dependent upon the termination of the trust, and that the share of the one who died, with the accumulations of income therefrom, descended to his heirs or next of kin, according to the nature of the property; also, that such descendants were entitled to any income that may hereafter accrue during the trust period.

The general rule that when a testamentary gift is found only in a direction to divide at a future time, the gift is future and contingent, and not vested, is subordinate to the primary canon of construction, that the construction shall follow the intent to be collected from the whole will.

(Argued March 28, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 14, 1888, which affirmed a judgment, entered upon a decision of the court on trial at Special Term.

This was an action for the construction of the will of

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Andrew Froelich, who died leaving a widow and four minor children, one of whom has since died, surviving him.

The questions arose as to the residuary clause of the will, which is as follows:

"*Third.* I give, devise and bequeath all the rest, residue and remainder of my property, real and personal and mixed, of what nature and kind soever, and whatever the same may be at the time of my death, to my friend Lewis S. Goebel and to my brother Phillip Froelich. In trust, nevertheless, to take charge of my real estate, collect the rents and income thereof, and out of the same pay all taxes, assessments, water rates, insurance premiums and all moneys necessary to keep the buildings upon the said real estate in good repair and condition. And upon the further trust to pay over one-half of the net rents and income of my said real estate to my wife, Caroline Froelich, quarter yearly, for the support and maintenance of herself and my minor children, and in lieu of dower. And upon the further trust to apply the remaining one-half of said net rents and income to the payment of any mortgage or mortgages that may be liens upon said real estate. And upon the further trust, after the payment of all mortgages upon said real estate, to invest the said one-half of said net rents and income upon bond and mortgage upon unincumbered real estate in the city of New York or Brooklyn, for the benefit of my children. And upon the further trust to take charge of my store, fixtures and stove trimming business in the city of New York, city of Newark, New Jersey, and foundry in the city of Brooklyn, together with all the stock of goods on hand, materials, fixtures, machinery, patterns, tools, implements and appurtenances; also, all book accounts, outstanding claims, and, in short, everything connected with my said business. And upon the further trust, to continue the said business and carry on the same, and to continue to carry on the same until my youngest child shall arrive at the age of twenty-one years, or so long as the net profits of said business shall yield ten per cent upon an investment of fifty thousand dollars. And upon the further trust

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to sell and discontinue said business whenever my said executors and trustees shall deem it for the best interest of my said estate so to do. And upon the further trust, to retain out of the net profits of said business the sum of ten per cent of such net profits as compensation to my said executors and trustees for their services in the management of the said business, said sum of ten per cent to be in addition to the lawful commission allowed them as executors and trustees. And upon the further trust to invest the net profits and income from said business after deducting the said ten per cent compensation to said executors and trustees, upon bond and mortgage upon unincumbered real estate in the city of New York or Brooklyn, or to deposit the same in some savings bank or banks of good standing in the city of New York or Brooklyn for the benefit of my children.

"And upon the further trust to convert all my personal property, not above mentioned, into money, and to invest the same for the benefit of my said children in the same manner as my other moneys are to be invested as above provided.

"And upon the further trust to pay and advance to each of my children as they respectively arrive at the age of twenty-one years, or as they respectively marry, the sum of three thousand dollars.

"And upon the further trust, immediately upon the arrival of my youngest child at the age of twenty-one years, in case my said wife shall not then be living, to divide all my estate, real and personal, and the accumulations of interest, equally among my children, share and share alike, after deducting all advances made, as above provided, to any of my children, so that each of my children shall have and receive an equal share of my estate. Should my said wife be living at the time my youngest child arrives at the age of twenty-one years, then it is my will and pleasure that no division of my estate shall be made until after the death of my said wife."

Josiah T. Marean for appellants. There is no gift of the remainder in the *corpus* of the real estate or in the *corpus* of

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the business, after the termination of the trust, except by the direction to divide at a future age of the youngest child. That gift did not, therefore, vest at the testator's death. It is a gift to a class and vested in each child as a member of the class only at his majority. Those children who die under twenty-one take no interest which will devolve upon their heirs or personal representatives. (*Lloyd v. Lloyd*, 3 K. & J. 20; *In re Grimshaw*, 11 Ch. D. 406; *Knight v. Knight*, 2 S. & St. 490; 2 Jarman [5th Am. ed.] 457; *Leake v. Robinson*, 2 Mer. 363; *Leaming v. Sherratt*, 2 Hare, 14, 23, 24; *Ford v. Rawlins*, 1 S. & St. 328; *Shipman v. Rollins*, 98 N. Y. 327; *Colton v. Fox*, 67 id. 348; *Smith v. Edwards*, 88 id. 103; *Hobson v. Hale*, 95 id. 613; *Teed v. Morton*, 60 id. 502; *Delany v. McCormick*, 88 id. 174.) There is nothing here which requires the court to depart from the settled rule of construction that a gift by a direction to pay or divide at a future age does not presently vest. (*Lloyd v. Lloyd*, 3 K. & J. 20; 2 Jarman [5th Am. ed.] 457, 463; *Leake v. Robinson*, 2 Mer. 363.) There is nothing in the disposition of the rents and income during the continuance of the trust to take the case out of the rule. (*Warner v. Durant*, 76 N. Y. 135; 2 Jar. [5th Am. ed.] 461, 463, 465; *Lloyd v. Lloyd*, 3 K. & J. 20; *In re Grimshaw*, 11 L. R. Ch. D. 406; *Knight v. Knight*, 2 S. & St. 490; *Haxton v. Corse*, 2 Barb. 517; *Crooke v. County of Kings*, 97 N. Y. 421.) Where the gift is to children as a class by a direction to divide at the majority of the youngest, the gift will vest in each child, as a member of the class, at his own majority. If he dies of full age, though the youngest may be still in his minority, his representatives will be entitled to his share. (*Leeming v. Sherratt*, 2 Hare, 14, 23, 24; *Smith v. Edwards*, 88 N. Y. 106; *Ford v. Rawlins*, 1 S. & St. 328.) It is not necessary to support a direction for accumulation that the infant should have a vested future estate in the *corpus*, but only that the income should, as received, be received for the sole benefit of the infant, subject only to retention during his minority. (*Pray v. Hegeman*, 92 N. Y. 515, 516.) It is only where the power of alienation or ownership is suspended

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that rents and income undisposed of go to the person presumptively entitled to the next eventual estate. (1 R. S. 774, § 2; id. 726, § 40.) The trust is valid as to one-half of the real estate only for the life of the widow, since at her death the purposes of the trust will have been accomplished. (*Byne v. Blackburn*, 26 Beav. 41.)

Isaac Lawson for respondent. The interest of testator's children vested at his death. An estate is vested when there is an immediate right of personal enjoyment, or a present right of future enjoyment. (*Sheridan v. House*, 4 Keyes, 569; *Moore v. Lyons*, 25 Wend. 144.) In the construction of wills the intention of the testator, to be derived from the will itself, is the governing principle, and technical rules will only be resorted to when the language of the instrument leaves such intention in doubt. (*Shipman v. Rollins*, 98 N. Y. 311; *Smith v. Edwards*, 88 id. 105; *Delafield v. Shipman*, 103 id. 463-468; *Scott v. Guernsey*, 48 id. 106; *Stephenson v. Lesley*, 70 id. 512.) Under the devise to the executors they took an estate commensurate with the trusts created, no more. (*Stephenson v. Lesley*, 70 N. Y. 512.) The residue vested in the children of the testator at his death, and it was alienable, devisable and descendable. (*Rathbone v. Hooney*, 58 N. Y. 463.) The devise to the executors to divide was void as a trust. At most it was a power, and the lands descended to the heirs of the testator subject to the execution of the power. (*Konvalinka v. Schlegel*, 104 N. Y. 130; *Radley v. Kuhn*, 97 id. 23-35.) An attempt by a testator to devise his lands upon an unauthorized trust does not intercept the passing of the legal title to his heirs or ultimate devisees or beneficiaries. (*Cooke v. Platt*, 98 N. Y. 35.) The remainder will vest upon the decease of the testator, and the right become absolute upon the termination of the intervening estate, by the death of the devisee during minority. (2 Redf. on Wills [3d ed.] 220, 227, 233; *Everitt v. Everitt*, 29 N. Y. 39, 75; *Manice v. Manice*, 43 id. 303, 380.) The direction for the accumula-

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tion of income must be for the benefit of a minor solely and during his minority, and when the period of accumulation ceases the accumulated funds shall be released from further restraint and paid over to the person for whom the accumulation is directed. (*Pray v. Hegeman*, 92 N. Y. 508.)

ANDREWS, J. No exception was taken to the finding that, by the will in question, a valid trust was created in the executors, as trustees, in all the real estate of the testator during the life of the widow and the minority of his youngest child. The validity of the trust to carry on the business, and in the personalty connected therewith, is conceded. We shall, therefore, assume, without examination, that the trusts in the will in their main aspects were legally constituted.

The counsel for the appellant does, indeed, present the point that the trust as to the one-half of the real estate will terminate in the event of the death of the widow during the minority of the youngest child, but that event has not happened and may never happen, and the consideration of the question may properly be postponed until the exigency arises which will render its determination necessary.

The practical question in the case grows out of the fact that one of the four infant children of the testator, living at his death, has since died under age, without issue, during the trust term, and the point is whether, by the true construction of the will, the children of the testator took, upon his death, a vested remainder in his real estate, dependent upon the termination of the trust, and, also, in the personal property embraced therein, or whether the remainder given by the will to the testator's children was contingent upon their surviving the term upon which the trusts were limited, and carries the whole estate to such of the four children, and those only, who outlive the prescribed period. On one construction of the will each child took on the testator's death a future vested estate in the undivided one-fourth part of the father's property, descendible on the death of any child to his heirs or next of kin, although he may have died during minority and during the trust period. On the

other construction the gift of the father's estate was to such children only as survived the trust term, so that if one died, intermediate the death of the testator and the termination of the trust, the survivors would take the whole, or if three died the entire estate would vest in the sole survivor, and this, although the deceased child or children might have married and left issue surviving at their death, who also survived the period of division.

Two leading purposes of the testator in creating the trusts in his will are plainly indicated on the face of the instrument. The first was to provide an income for the support of his wife and of his children during their minority. To accomplish this purpose he provided that one-half of the rents and income of his estate should be paid by the trustees to his wife in quarter-yearly payments "for the support and maintenance of herself and my minor children." The second purpose was to postpone the division of his estate among his children until the termination of the trust term, and meanwhile to accumulate the income not given to his wife, and at the expiration of that period to divide the *corpus* with the accumulations between his children. But the learned counsel for the appellant contends that the final gift to the children is so framed that only children living at the time of the division are to participate therein, or, in other words, that the gift is future and contingent and to the children as a class, so that, in accordance with the general rule of construction in such cases, only such persons of the class as are in existence when the contingency happens, upon which the remainder is limited, are comprehended. (*Doe v. Stewart*, 13 East, 526; 1 Jarman on Wills [5th ed.] 341.)

The clause upon which the appellant relies to sustain the construction that the gift was to the children as a class, and was intended for such children only as should be living at the termination of the trust, is as follows: "And upon the further trust immediately upon the arrival of my youngest child at the age of twenty-one years, in case my wife shall not then be living, to divide all my estate, real and personal, and the

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accumulations of interest, equally among my children, share and share alike, after deducting all advances made, as above provided, to any of my children, so that each of my children shall have and receive an equal share of my estate. Should my wife be living at the time my youngest child arrives at the age of twenty-one years, then it is my will and pleasure that no division of my estate shall be made until after the death of my said wife."

When a devise is made or a legacy given, of which the enjoyment is postponed, "the leading inquiry upon which the question of vesting or not vesting, is, whether the gift is immediate, and the time of payment or enjoyment only postponed, or is future or contingent, depending upon the beneficiary arriving at age, or surviving some other person, or the like." (DENIO, J., *Everitt v. Everitt*, 29 N. Y. 67.) In harmony with this general rule, another general proposition has been formulated, that where the only gift is found in a direction to divide at a future time, the gift is future, and not immediate; contingent, and not vested. (*Leake v. Robinson*, 2 Mer. 363; *Warner v. Durant*, 76 N. Y. 133; *Smith v. Edwards*, 88 id. 92.) The latter principle is invoked in this case. There is in the will no gift in terms to the children of the testator, except in the clause of the will above quoted, providing for a division of his estate among his children on the termination of the trust. But the rule invoked, as others of like character, is subordinate to the primary canon of construction, that the construction shall follow the intent, to be collected from the whole will; and that the intention of the testator, so ascertained, must prevail; and that general rules, adopted by the courts in aid of the interpretation of wills, must give way when on a consideration of the scheme of the will, or of special clauses or provisions, their application in the particular case would defeat the intention. This was recognized by Sir WILLIAM GRANT in the case cited from Merivale's reports, who, after stating the general rule that where, in a will, there is no gift, except in a direction to divide at a future time, the gift is contingent, and not vested,

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adds the qualification, "unless from particular circumstances you are able to collect a contrary intention." Many important exceptions have been engrafted on the rule by the adjudged cases, which are stated in the elementary treatises, and some of which are specially considered in *Smith v. Edwards* (*supra*).

In the present will there is, as we have said, no immediate gift, in terms, of the remainder to the children of the testator living at his death. The question, therefore, is whether, upon the whole will, such an intention can be collected. We think that, taking the whole will together, it was the intention of the testator to vest his estate at his death in his then living children, subject to the trust estate in his executors. There is nothing on the face of the will to indicate that the testator contemplated the death of any of his children during minority, or that any of them might not take the equal one-fourth share of his estate on the final division. The gift of the ultimate estate is not, in terms, to his children *living* at the time of the division, or to the *survivors* of his children, but the division is directed to be made "among my children, share and share alike." Words of survivorship were not necessary if the gift, by construction of law, was to the children who should be living at the time of division. But it would have been very natural that words of survivorship should have been inserted to emphasize his intention if the testator had intended that only children surviving at that time should be entitled to his estate. The division was to be made "immediately upon the arrival of my youngest child at the age of twenty-one years," etc. This language, in connection with the other provisions of the third or trust clause of the will, is most consistent with the construction that the time was fixed to define the period of enjoyment of his estate by his children, rather than the period of the vesting of the shares. There was a manifest propriety in postponing the enjoyment by the ultimate beneficiaries of one-half of the real estate to accomplish the testator's purpose to provide an income for the support and maintenance of the widow and minor children. There was also a good reason for postponing the enjoyment of the other half for

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the purpose of paying meanwhile the mortgages and incumbrances out of the income, which the testator directed should be done. The income, after this purpose had been accomplished, the testator directed should be invested for the "benefit of my children." A similar direction was given in respect to the net profits of the business, which he authorized the trustees to carry on after his death. They were to be invested for the "benefit of my children." There is nowhere in the will any suggestion that the testator had in view any particular children or surviving children, or children other than the whole number in any clause or provision of the will. But what is quite significant on the point whether the testator intended a vested gift of a future estate to his children living at his death, is the fact that the personal property, not connected with his business, he gave to his children in terms which are conceded to have passed an immediate, absolute title in possession on the testator's death. But the gift was accompanied by a direction to his trustees "to invest the same for the benefit of my *said* children," using the same language to designate the beneficiaries as in the prior cases. But more significant still of the intention of the testator is a provision directing the trustees to "pay and advance to each of my children as they respectively arrive at the age of twenty-one years, or as they respectively marry, the sum of three thousand dollars," and later on, in the clause relating to the division, the testator directs that the division of the *corpus* and the accumulations shall be made "equally among my children, share and share alike, after deducting all advances made as above provided, to any of my children, so that each child may have and receive an equal share of my estate." It thus appears that the testator had in contemplation the possible marriage of one or more of his children during minority, and, of course, possible issue, and next that he treated the shares of his children as separable and distinct, and any advance which might be made, under the will, to a married minor child as a charge on his or her share, to be accounted for in the subsequent division. The purpose of the charge, "so that each of my children shall have and

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receive an equal share of my estate," implies ownership of the share against which the advance is to be charged. In *Everitt v. Everitt* (*supra*), the circumstance that advancements were authorized to be made to children before the period fixed for the division was considered as indicating an intent that the shares should be vested on the death of the testator. On the whole, we are of the opinion that the intention of the testator, as derived from a consideration of the whole will, was to vest in each child living at his death an equal share of his estate, subject to the trust during the specified time, and that no settled rule of construction forbids giving effect to such intention. The circumstances collectively point to this construction. The constitution of the trust was convenient to accomplish intermediate purposes between the testator's death and the final division, viz., the securing of support and maintenance to his wife and minor children; the payment of mortgages and incumbrances; the carrying on of the business for the benefit of the estate; the accumulation of surplus income during the minority of the children. This construction also prevents the disinheritance of issue of any child who may marry and die before the expiration of the trust period, a consequence which no one can doubt the testator never intended. The four children were in the testator's mind when he made the will, and in all the dispositions and provisions, the children, "my children," were the objects, selecting none and excluding none, and in the provision for advances the share of each was treated as vested and subject to charge.

The provision for accumulation became inoperative as to the share of the deceased minor child upon his death. An accumulation is only permitted for the benefit of living objects. (*Bryan v. Knickerbacker*, 1 Barb. Ch. 409.) We think the consequence of such death was to devolve the title to the one-fourth part of the estate in remainder upon the heirs-at-law and next of kin of the deceased child, according to the nature of the property, subject to the trust, and that they are likewise entitled to a like proportionate share of any income

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accumulated to the time of the death, and to such as shall hereafter accrue during the trust period.

These views lead to an affirmance of the judgment.

All concur.

Judgment affirmed.

JAMES GREGORY, Respondent, v. THE MAYOR, ALDERMEN AND
COMMONALTY OF THE CITY OF NEW YORK, Appellant.

Plaintiff was, in 1879, employed by the commissioners of excise of the city of New York as an inspector of excise. On December 16, 1880, he received notice that he had been, by resolution of the excise board, "suspended without pay," and after that time he was not allowed to render any services. He frequently attended at the office of the excise board and offered to discharge the duties of inspector. He never received any notice of dismissal. In an action to recover salary claimed to be due it was conceded that the board of excise commissioners had power to remove their employes, and defendant claimed that the power to suspend was included therein. *Held*, untenable; that there is nothing in the power to remove or expel which necessarily and in all cases includes the power to suspend, and the latter power may not be implied from the mere grant of the former; that while there might be cases where such an inference might be drawn from the general scope and nature of the act granting the power, there was nothing in this case justifying it.

Also, *held*, that the tenders of performance made by G. were sufficient.

Shannon v. Portsmouth (54 N. H. 188) disapproved.

(Argued March 28, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 26, 1887, which affirmed a judgment in favor of plaintiff, entered upon a verdict directed by the court.

This action was brought by plaintiff to recover salary claimed to be due him as inspector of excise in the city of New York from December 15, 1880, to September 1, 1881.

The facts are sufficiently stated in the opinion.

William C. Turner for appellant. The resolution of December fifteenth, by which the board of excise suspended

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the plaintiff from duty without pay, of which notice was communicated to the plaintiff, is a valid exercise of the power of the commissioners, and precludes the plaintiff from recovery. (Dillon on Mun. Corp. .271, note; *Shannon v. Portsmouth*, 54 N. H. 183; *Westbury v. Kansas City*, 64 Mo. 493; *Wayne Co. v. Benoit*, 20 Mich. 176; *Attorney-General v. Davis*, 44 Mo. 176; *Primm v. Carondelet*, 23 id. 22), The plaintiff was a mere employe, having no fixed term of employment, whom the excise commissioners could, therefore, employ, discharge, re-employ at pleasure, day by day, as their convenience might require; he was, therefore, duly discharged by the notice of suspension from duty and pay, and until re-employed, at the pleasure of the board, his discharge continued. (*People v. Board of Police*, 75 N. Y. 42; *Sullivan v. Mayor, etc.*, 47 How. Pr. 491.)

C. W. West for respondent. A clear and certain contract of hiring cannot be terminated by the master save by his unqualified dismissal of the servant, or other unequivocal act. (*Alker v. Mayor, etc.*, 27 Hun, 413, 415; *McCoy v. Mayor, etc.*, 46 id. 268.)

PECKHAM, J. The claim that the plaintiff was not an employe of the defendant does not seem to have been raised upon the trial. It was not included as a ground in the motion for a nonsuit made by the defendant, and does not seem to have been raised by any proper exception taken in the progress of the trial. The defendant, at the end of the case, asked the court to direct the jury to find a verdict for the defendant, and never asked that any question of fact should be submitted to it. The court was, therefore, placed in the position of the jury upon any such question, and the decision thereof by the court is binding upon us if there were any evidence to sustain it.

The trial judge was amply justified by the evidence in holding, as a fact, that the plaintiff never received any notice of dismissal, and we are concluded by such finding. The only question that is left for discussion is, whether the resolution of

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the commissioners of excise, which assumed to suspend the plaintiff indefinitely, and without pay, from the performance of his duties was authorized. It is claimed that the power of the commissioners to suspend their employes was included in the conceded power to remove them. The question has not been decided in this state, but in New Hampshire the Supreme Court has held that the power to remove did include the power to suspend. (*Shannon v. Portsmouth*, 54 N. H. 183.) In that case it was merely stated in the opinion that it did not require any argument to show that the power to remove must include the power to suspend, and hence the learned court made use of none in deciding the question. The note to section 151 of Dillon on Municipal Corporations was cited as authority for the proposition. I think the section (151) is the same, in substance, as section 247 of the third edition of that work in two volumes. I have not found anything in the text of the learned author which would furnish any reason for the decision of the New Hampshire court. In the note to section 247 some cases are referred to, and, in one of them, it was assumed that what is called therein the minor power to suspend was included in the power to remove. (*State v. Lingo*, 26 Mo. 496.) In *State v. Chamber of Commerce of Milwaukee* (20 Wis. 63) the board of directors had assumed to suspend a member. The corporation was given power to expel. The court held that the power to suspend was reposed in the corporation, and could not be delegated to the board of directors, and hence the board had proceeded without authority. The suspension of the member, it was said, was a qualified expulsion, and, whether it was called suspension or expulsion, it disfranchised him either temporarily or permanently; and, as he was suspended by the board of directors without a vote of the members of the corporation, his suspension was unauthorized. There may be some distinction between the power to expel or, in the technical language of the books, to disfranchise a member of a corporation, and the power to remove an employe of a city board, and it might be argued that, in the former case, a suspension is, as the court

said, a temporary disfranchisement, and an act of the same nature as an expulsion, and that the power to expel in such a case would include a temporary exercise thereof by a suspension. However that may be, the court seems to have placed its decision upon the ground that the suspension was within the power of the corporation because it only accomplished a temporary deprivation of the rights of a member when the corporation had the power to make such deprivation permanent by an expulsion.

On the other hand, in *State v. Jersey City* (1 Dutcher, 536) the effect of the resolution passed by the common council was held by the court to work a suspension of the member if it had been valid. The council had power to expel for cause. It had once expelled the member for bribery and he had been re-elected, and the council then adopted the resolution which the court said was a virtual suspension. It was held that the council had no power to again even expel the member for the offense for which he had been once expelled and subsequent to which he had been re-elected; and, as to suspension, the court said the charter vested no such power in the council, and that it would have been extraordinary if it did; that the power was to expel, not to suspend, because expulsion left the office vacant so that it could be supplied by a new election, while suspension from duties created no vacancy and left the constituency of the member unrepresented.

The case shows that there is nothing in the nature of the power to remove or expel which necessarily and in all cases would include a power to suspend, for, in some instances, of which the above case is a good example, the power to suspend would seem to be very different in its nature from the power to remove, and not necessarily a minor power included in the power of expulsion. The rights of a constituency might be affected most deeply by the exercise of the power to suspend, and yet would be, in truth, untouched by the expulsion of an unworthy representative. Whether the power to remove includes the power to suspend, must, as it seems to us, depend, among other things, upon the question whether the suspension

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in the particular case would be an exercise of a power of the same inherent nature as that of removal, and only a minor exercise of such power, or whether it would work such different results that no inference of its existence should be indulged in, based only upon the grant of the specific power to remove. We think it is apparent that the two powers cannot always be properly respectively described as the greater and the less, and, consequently, it cannot always be determined, simply upon that ground, that the suspension is valid because there was a power to remove. The power to remove is the power to cause a vacancy in the position held by the person removed, which may be filled at once, and if the duties are such as to demand it, it should be thus filled. The power to suspend causes no vacancy and gives no occasion for the exercise of the power to fill one. The result is that there may be an office, an officer and no vacancy, and yet none to discharge the duties of the office. By suspension the officer is prevented from discharging any duties, and yet there is no power to appoint anyone else to the office because there is no vacancy. If it be claimed that the power to suspend also includes the power to fill the place of the officer suspended during such suspension, then there is a second presumed power which flows from the simple power to remove. There is the power to suspend and there is the further power to be implied from it, viz., the power to fill the office with another during such suspension, although there is no vacancy in the office.

We do not think either of these last-named powers should be implied in the mere grant of the power to remove. We are not inclined to go so far with the doctrine of implied grants of power, because we think the implication is not one which naturally or necessarily arises out of the nature of the main power granted, and its denial in such cases as this can, as we think, work no possible mischief. We do not go to the extent of saying that in no conceivable case can the power to suspend be inferred from a grant of the power to remove. There may be cases where such an inference, arising from the general scope and nature of the act granting the power,

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would be so strong as to compel recognition. We think there is no such inference to be drawn in the case before us.

The plaintiff held the position of excise inspector, and it was his business, as he described it, "to go 'round to different places where liquor was sold and see if the sellers were licensed, and if they were not, that they should get one; also to see that the sale of intoxicating liquors in the city of New York was carried on properly." These duties were, necessarily, to be discharged out of the sight of the commissioners. Upon the fidelity and prudence with which such duties were discharged depended, in great part, the proper enforcement of the law. The commissioners might believe that the inspector was not doing his duty, and yet be unable to show exactly wherein he failed. Proof thereof on charges, to be regularly preferred, would amount almost to a denial of the power to remove, because, the duties being of such a nature as above described and to be performed beyond the view of the commissioners, the inference of a failure to perform them might be based upon such a number of disconnected facts that it would not be regarded as justified upon a regular trial. Hence the necessity of a power to remove when the commissioners might feel there had been a dereliction of duty without being able to point out any specific fact as evidence thereof, while the power of indefinite suspension, without pay, would not add anything to the security of the city or the power of the commissioners to obtain honest service. If the employe were unfit, it would be the duty of the commissioners to remove him at once. If not unfit, he should not be suspended indefinitely, without pay.

It seems to us that the power of removal in such a case as this was intrusted to the commissioners to be exercised, if at all, at once and finally. It was not meant that they should have power to arbitrarily suspend without pay, and then appoint some other in the place of the suspended man, and perhaps suspend or remove the alternate and again appoint some other. The tendency would be to confuse instead of perfecting the service. The effect upon the suspended man would also be

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demoralizing, causing him to expend his time in efforts to get reinstated rather than in endeavors to procure a livelihood in other ways, which would be the result of a removal. As the existence of the power to suspend depends upon our inferring it from the grant of the power to remove, all of the views above suggested may properly be regarded as bearing upon the question whether there is any inherent necessity for an inference of such a nature. The Constitution of our state, in section 3 of article 5, in providing for the appointment of a superintendent of public works, says that, "he may be suspended or removed from office by the governor, whenever," etc. In section 4 of the same article provision is made for the appointment of a superintendent of state prisons, and it is stated that "the governor may remove the superintendent for cause at any time," etc. Has the governor power to suspend in both cases? This difference of language in the organic law rather tends to the idea that the framers of these two provisions were not entirely sure that the power to remove included the power to suspend, or that the latter power was always of the same nature and only less in extent than the former.

We think the commissioners had no power to suspend the plaintiff, and that the frequent attendance of the plaintiff at the office of the board, and his continuous offers, to discharge the duties of the position to which he had been appointed, were sufficient tenders of performance on his part to warrant the conclusion of the learned trial judge in directing the verdict.

We see no errors in the record, and the judgment should be affirmed, with costs.

All concur, except RUGER, Ch. J., not voting

Judgment affirmed.

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THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF
NEW YORK, Respondent, v. JONAS SONNEBORN, Appellant.

In an action to recover rent which had accrued under a lease of a certain pier in New York city, it was admitted that defendant had had the full benefit of the lease in the use of the pier and the collection of wharfage according to its terms. Defendant put his defense on the sole ground that the lease was not made after or in pursuance of any sale by public auction of the privilege conferred, as required by the statute (§ 87, chap. 383, Laws of 1870), which was conceded by the plaintiff. *Held*, that this constituted no defense; that defendant having had the full benefit of the contract, was estopped from questioning its validity.

Pratt v. Eaton (18 Hun, 298) distinguished.

(Argued March 28, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 1, 1886, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

The nature of the action and the facts are sufficiently stated in the opinion.

David Gerber for appellant. As the wharfage franchise was not offered for sale at public auction to the highest bidder, the lease is illegal and void, and unenforceable in a court of law. (Laws 1870, chap. 137, § 99; Laws 1871, chap. 574; Laws 1873, chap. 335, § 88; Laws 1882, chap. 410, § 716.) A sale or leasing by an officer of a municipal corporation, in violation of the inhibition of the statute directing that it shall only be to the highest bidder at a public auction, is illegal and incapable of enforcement. (*Halstead v. Mayor, etc.*, 3 N. Y. 430-433; *Brady v. Mayor, etc.*, 20 id. 312; *McDonald v. Mayor, etc.*, 68 id. 23; *Schwank v. Mayor, etc.*, 69 id. 444; *Parr v. Village of Greenbush*, 72 id. 463, 471; *Dickinson v. City of Poughkeepsie*, 75 id. 65-75; *Smith v. City of Newburgh*, 77 id. 130; 1 Dillon on Mun. Corp. §§ 449-466; *Hodges v. City of Buffalo*, 2 Denio, 110; *Cowan*

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v. *Vil. of West Troy*, 43 Barb. 48; *Taylor v. Beebe*, 3 Rob. 262; *Smith v. City of Buffalo*, 1 Sheld. 493; *Sillocks v. Mayor, etc.*, 11 Hun, 431; *Addis v. City of Pittsburgh*, 17 Alb. L. J. 58; *City of Jefferson v. Patterson*, 35 Ind. 140; *Zottman's Case*, 20 Cal. 96; *Rumsey Mfg. Co. v. Shell City*, 4 West. Rep. 752; *Agowam Nat. Bk. v. Inhabitants of South Hadley*, 128 Mass. 503.) The violation of the statute requiring a sale by a public officer to be consummated only after a sale at public auction, and then to the highest bidder, renders the contract illegal and incapable of enforcement though executed, so that even a recovery upon *quantum meruit* would not be sanctioned. (*Brady v. Mayor, etc.*, 20 N. Y. 312; *McDonald v. Mayor, etc.*, 68 id. 23; *Schwank v. Mayor, etc.*, 69 id. 444; *Parr v. Village of Greenbush*, 72 id. 463-467; *Dickinson v. City of Poughkeepsie*, 75 id. 65-75; *Smith v. City of Newburgh*, 77 id. 130-135; *City Council v. Montgomery Plank-Road Co.*, 31 Ala. 76; *McCracken v. City of San Francisco*, 16 Cal. 591; 2 Hoffman's Laws of City of New York, 862, 864-866, 873.) Even if the defendant's object in securing the lease was to limit the use of the wharf to a special purpose, no conditions can be engrafted upon it inconsistent with its terms. (Wood's Land. and Tenant, 117.) The defendant, as well as the public, on the payment of the wharfage, could, as a matter of right, use the wharf for any and every lawful purpose. (*Commissioner of Pilots v. Clark*, 33 N. Y. 251-264; *Roadway v. Briggs*, 37 id. 256; *Mayor, etc., v. Rice*, 4 E. D. Smith, 609.)

William C. Turner for respondent. The defense that the contract in question was *ultra vires* on the part of the corporation will not avail to shield the defendant from liability to pay the rental reserved. (*Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Parrish v. Wheeler*, 22 id. 494; *Steam Navigation Co. v. Weed*, 17 Barb. 378; *Woodruff v. E. R. Co.*, 93 N. Y. 618; *Bissell v. Michigan Southern R. R. Co.*, 22 id. 258; *Moss v. Rossi Mining Co.*, 5 Hill, 137; *Arnot v. Erie R. Co.*, 67 N. Y. 315; *Buffet v. T. & B. R. R. Co.*, 40

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id. 168; *Fisher v. N. Y. C. & H. R. R. Co.*, 46 id. 644; *Remsen v. Graves*, 41 id. 471; *Olcott v. Cayuga R. R. Co.*, 27 id. 546; *Castle v. Lewis*, 78 id. 134, 136; *Kent v. Quick-silver Mining Co.*, Id. 183; 1 Dillon on Mun. Corp. [3d ed.] 88; *Bailey v. Mayor, etc.*, 3 Hill, 539; *Dartmouth College v. Woodward*, 4 Wheat. 668, 672.)

DANFORTH, J. On the 21st of April, 1873, the defendant took a lease from the plaintiff, through the commissioners of the department of docks, of a certain pier in the city of New York for the term of five years from the 1st of May, 1873, and agreed to pay therefor the annual rent of \$5,000 in equal quarterly payments, the first payment to be made August 1, 1873. He took and retained possession of the premises, but failed to pay the rent due August 1, 1874, November 1, 1874, and February 1, 1875, and this action was brought for its recovery.

The defendant answered, denying none of the material allegations of the complaint, but setting up new matter by way of defense. At the trial he at once assumed the affirmative, and put his defense on the sole ground that the lease was not made after or in pursuance of any sale by public auction of the privilege conferred thereby. This was conceded by the plaintiff and found by the court to be the fact, and the only question upon this appeal is whether the court below erred in holding that it constituted no sufficient answer to the plaintiff's cause of action.

The appellant relies upon the statute (*infra*), which declares that "all leases other than for districts appropriated by said board to special commercial interests, shall be made at public auction to the highest bidder" (Laws of 1870, chap. 383, § 37), and his contention is that, by reason of the omission to comply with this provision, the lease is illegal and void and his contract not enforceable. No fraud is alleged, nor is it disputed that the plaintiff has performed every obligation on its part, and the appellant has had the full benefit of the

lease in the use of the premises demised, and the collection of wharfage according to its terms. I find nothing in the statute which, under the circumstances, need embarrass the defendant in fulfilling the obligation which he incurred.

The department of docks have, by statute, an absolute and exclusive discretion in determining what piers shall be leased, and for what terms, not exceeding ten years (Laws of 1871, chap. 574; Laws of 1873, chap. 335, § 88; Laws of 1882, chap. 410, § 716), and are given a general authority to make leases therefor, but for other than the excepted districts (*supra*) "at public auction to the highest bidder."

The court below refused to find, as requested by the defendant, that the premises in question were not so excepted, and upon that ground alone it might be said that the defendant failed to bring his case within the statute.

But there is a further reason against his appeal, resting upon broader ground. He has had the full benefit of the contract and, therefore, cannot be permitted, in an action founded upon it, to question its validity. The principle of estoppel upon which this rule stands has been recognized and applied in a uniform course of recent decisions by this court, and there is no feature in the present case which requires a renewed discussion of the subject. (*Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Rider Life Raft Co. v. Roach*, 97 id. 378.) If the lease were evil in itself, and so, void as against public policy, or if it had been declared illegal or void by statute, as the contract was in *Pratt v. Eaton* (18 Hun, 293), a different question would have arisen. It is simply one of capacity or power, and the rule I have referred to is applicable to an action brought by a municipal as well as another corporation. The party benefited by its exercise cannot be heard to deny its existence.

The judgment appealed from should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

MARY A. TALLINGER, Appellant, v. AUSTIN MANDEVILLE et al.,
as Executors, etc., Respondents.

113	427
119	547

113	427
d161	558

In pursuance of an ante-nuptial agreement, T., defendants' testator, executed to plaintiff, his wife, an instrument, by which he agreed to pay to her \$10,000 at his death, provided she lived with him as his wife up to that time and faithfully performed the duties of that relationship. Subsequently the parties executed another instrument, by which plaintiff, in consideration of \$5,000 then paid to her by her husband, released and canceled the former agreement. In an action upon the original agreement, *held*, that while the later one, so long as it remained executory, could not have been enforced, yet having been executed, in the absence of any allegation of fraud, plaintiff was not entitled to be relieved therefrom; that having released her husband's obligation she could be reinstated in her rights under it only by a suit in equity instituted for that purpose. The law will not interfere at the instance of either party to relieve him from an illegal contract, so far as it has been executed.

The defendants, aside from setting up the later agreement, alleged in their answer a violation on plaintiff's part of the conditions precedent contained in the prior one. *Held*, that even if she had been overreached and thus induced to execute the release, she was not entitled to maintain the action until she had repudiated the later agreement and tendered back the money paid.

Reported below, 48 Hun, 152.

(Argued March 28, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the last Tuesday of March, 1888, which affirmed a judgment in favor of defendants, entered upon an order nonsuiting the plaintiff on trial.

The nature of the action and the material facts are stated in the opinion.

P. Chamberlain, Jr., for appellants. The contract of separation is an illegal one and against public policy and good morals, and being made between husband and wife, with no intervening trustee, was not binding upon the plaintiff, and it was, therefore, error for the court to nonsuit plaintiff. (*Saratoga Co. Bk. v. King*, 44 N. Y. 87; *De Burski v. Paige*, 36 id. 537;

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Thayer v. Rock, 13 Wend. 53; *Crawford v. Morrell*, 8 Johns. 253; *Dow v. Way*, 64 Barb. 255; *Friedman v. Bierman*, 25 Week. Dig. 526; 43 Hun, 387; *Kaufman v. Schoefel*, 37 id. 140; *Rogers v. Rogers*, 4 Paige, 516; *Richardson v. Crandall*, 30 How. Pr. 134; *Bertles v. Nunan*, 92 N. Y. 152; *Carson v. Murray*, 3 Paige, 483; *Curry v. Curry*, 10 Hun, 366; *Van Order v. Van Order*, 8 id. 315; *Perkins v. Perkins*, 62 Barb. 531; 1 N. E. Rep. 41; *White v. Wager*, 25 N. Y. 328; *Dupre v. Rein*, 56 How. Pr. 230; *Will of Smith*, 95 N. Y. 516; *Cornell v. Cornell*, 75 id. 91; *Carpenter v. Soule*, 88 id. 256; *Fisher v. Bishop*, 13 N. Y. State Rep. 466.) It was not necessary, under all the circumstances of this case, for the plaintiff to repay or offer to repay the amount received under the illegal contract before bringing her action. (*Pierce v. Wood*, 3 Foster [N. H.] 519; *Gould v. Cayuga Nat. Bk.*, 86 N. Y. 75.)

W. A. Sutherland for respondent. If the agreement itself, whereby plaintiff received this \$5,000, was that which created her separate estate, then the agreement is one to which she must stand. (*Herrington v. Robertson*, 71 N. Y. 280; *Cashman v. Henry*, 75 id. 103-115; *Jones v. Fleming*, 104 id. 418, 433.) The contract of July 20, 1882, whereby this plaintiff received \$5,000 in cash, was valid and binding, although made between husband and wife, without the intervention of a trustee. (*Brace v. Gould*, 1 T. & C. 226; *Seymour v. Fellows*, 77 N. Y. 178; *Dewey v. Durham*, 19 Week. Dig. 47; *Bodine v. Killeen*, 53 N. Y. 93; *Knapp v. Smith*, 27 id. 277; *Sherman v. Scott*, 27 Hun, 331; *Sheldon v. Clancey*, 42 How. 185; *Armitage v. Mace*, 96 N. Y. 538.) It is no answer to say that some parts of the agreement were contrary to public policy, and that the plaintiff may, therefore, retain all of the benefits received by the agreement and repudiate its obligations. (*Desbrough v. Desbrough*, 29 Hun, 592.)

EARL, J. On the 26th day of September, 1881, the plaintiff was married to the defendant's testator, Godfrey Tallinger,

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and they commenced to live together as husband and wife. On the eighteenth day of February thereafter the testator executed the following instrument:

"Whereas, I, Godfrey Tallinger, did on the 26th day of September, 1881, marry my present wife, Mary Tallinger, and did then, in consideration of said marriage, agree to secure to her the payment of ten thousand dollars upon my death, provided she would live with me as my wife until said time, and should in all things at all times perform faithfully the duties of a wife, and take such care of me and my household as I should request, and as should be proper and reasonable. Now, therefore, I do, in consideration of the premises, agree with said Mary, that ten thousand dollars shall be paid to her at my death, provided she shall faithfully perform all of said conditions on her part, and such performance in full shall be a condition precedent to any liability to her upon this agreement."

Both parties at the same time executed under seal another instrument, which was pinned to the former, as follows: "It is agreed between Godfrey Tallinger and Mary Tallinger that the annexed instrument shall, upon its delivery, be deposited with Satterlee and Yeoman^s, or such other person or persons as said parties may agree upon at any time, to be held by them until the death of said Godfrey Tallinger, as the said Godfrey desires that it should not be made a public matter, and that the observance of this agreement, upon the part of said Mary Tallinger, shall be a condition precedent to any liability upon said agreement."

The domestic life of Mr. and Mrs. Tallinger soon became unhappy and inharmonious, and an agreement was made for a separation, in pursuance of which, on the 20th day of July, 1882, they executed, under seal, the following instrument: "This agreement, made this 20th day of July, 1882, between Godfrey Tallinger, of Rochester, N. Y., and Mary Tallinger of the same place: Witnesseth, That in consideration of \$5,000.00, this day paid by said Godfrey to said Mary, and other valuable considerations, it is agreed that said Mary shall

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absent herself continuously from and not visit the house of said Godfrey, or communicate with him or molest him, or make any claim upon or against him in any manner or against his estate after his death, and will upon request of any person interested in the same, after his death, execute to and deliver to them release of dower or other claim or interest in the estate of said Godfrey; and the said Mary does hereby release all claim of dower or other interest in any property not owned by said Godfrey or which he may hereafter own; and if said Mary shall violate any of the conditions or provisions hereof, or shall fail to perform any of the same, she shall thereupon repay to said Godfrey, his assigns or personal representatives, said \$5,000.00 and the interest thereon from this date, as liquidated damages, and she charges her separate estate therewith, and a certain agreement heretofore executed by said Godfrey and said Mary, whereby he agreed to pay at his death, upon the performance of certain conditions therein expressed, the sum of \$10,000.00, is hereby canceled and abrogated."

Thereafter they lived separate, and Mr. Tallinger died on the 5th day of December, 1884. The plaintiff claimed dower in the real estate left by her husband, and it was admeasured to her; and in October, 1886, she commenced this action to recover the \$10,000 mentioned in the instrument executed February, 18, 1882. In her complaint she alleged an oral agreement to pay the \$10,000 in consideration of her marriage to the testator, and the subsequent execution of the written agreement, and that the \$10,000 became due and payable, and demanded judgment for that sum, with interest from the death of the testator. The defendants, in their answer, alleged, among other things, that the plaintiff did not, after the execution of the written instrument, live with the testator as his wife, caring for his household and performing all the duties of a wife faithfully; but that, on the contrary, she grossly and willfully failed and neglected to perform her duties in the care and management of his household, and to sustain the dutiful relations of a wife. And they set up, as a further

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defense, the execution of the instrument of July 20, 1882, and demanded judgment for \$5,000, as therein specified, for liquidated damages. The plaintiff served a reply, simply denying the allegations of the counter-claim.

Upon the trial the plaintiff gave some evidence tending to show misconduct on the part of her husband, and that she had just cause for separation from him. The defendants then proved the instrument dated July 20, 1882, and gave no further evidence. Upon defendants' motion, the court then nonsuited the plaintiff. The judgment entered upon the nonsuit was, upon appeal to the General Term, affirmed.

On the 20th day of July, 1882, the plaintiff held the obligation of the testator to pay her \$10,000, at his death upon the conditions mentioned. That obligation constituted her separate estate, and under the laws of this state she had the same right to deal with it as if she were a *feme sole*. She could sell, release or discharge it at her pleasure. It was payable upon certain conditions which might not be performed by her; and the estate of her husband might not, at his death, be sufficient to meet it. Hence, clearly, the instrument, payable at an uncertain time in the future, upon the contingencies mentioned, was not of the value of \$10,000. It is claimed, however, on the part of the plaintiff, that as she was the wife of the testator her agreement made with him on the 20th of July, 1882, did not bind her. It is undoubtedly true that so far as that agreement remained executory it could not have been enforced by Mr. Tallinger, or his executors. But it was executed. She received in cash \$5,000, and was released from the conditions contained in the prior instrument binding her to live with him and faithfully to perform the duties of wife, and to take care of him and his household during his life. For the surrender, therefore, of the prior obligation she received ample consideration. There is no allegation in the complaint or reply and there was no proof upon the trial that the consideration of \$5,000, paid to her in hand was not an adequate consideration for the surrender of the prior conditional obligation of her husband. There has never been a time in the

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history of the law, and certainly not since 1848, when such an agreement between husband and wife relating to her separate estate, and fully executed, would have been absolutely void. She surrendered an obligation which she then held as a part of her separate estate, and in lieu thereof received \$5,000, in money, and that became her separate estate; and it never could be held in a forum, administering both law and equity, that she could hold the money thus received and enforce the obligation which she had surrendered in consideration thereof. Agreements between husband and wife, founded upon valuable considerations, have frequently been enforced in equity. She may even sell her separate estate to her husband for a valuable consideration, and the sale will be upheld in equity. (*White v. Wager*, 25 N. Y. 328; *Winans v. Peebles*, 32 id. 423; *Hunt v. Johnson*, 44 id. 27; *Boyd v. De La Montagnie*, 73 id. 498.)

Here, by her own act, she surrendered, released and discharged her husband's obligation. Thereafter she did not, in any sense, hold or possess it, and she could regain it and be reinstated in her rights under it, only by a suit instituted in equity for that purpose, in which case relief could be granted to her according to the equities of the case as they appeared upon the proofs. The agreement of the 20th of July, 1882, cannot, therefore, be assailed in this action, because the parties thereto were husband and wife.

The further objection is made, on behalf of the plaintiff, that the agreement of July twentieth was illegal and against public policy, as it provided for the separation of husband and wife. If it were an executory agreement, and either party was seeking to enforce it, the objection would be a good one. But here the agreement had been executed. She took \$5,000 and gave up her obligation. The law will never interfere at the instance of either party with what has been done in execution of an illegal agreement. It simply refuses to enforce such agreements, or such as are against public policy; but it never intervenes to relieve either party against them so far as they have been executed. It refuses to enforce such agree-

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ments, not from any regard or concern for the parties thereto, but to promote the public policy and the general welfare; and, so far as they have been executed, they cease to interest the public, and public policy is supposed to be best subserved by letting them alone and leaving the parties to them where they have placed themselves. The obligation upon which she sues has been paid and discharged, and it does not avail her to say that such payment and discharge were in pursuance of an agreement which was, in fact, illegal. It has, nevertheless, been paid and discharged, and the law will not, at her instance, either directly or indirectly, set aside or undo what has been done on account of any illegality in the agreement.

It is also claimed by the plaintiff that, from the relation existing between her and Mr. Tallinger, it must be presumed that she was overreached, imposed upon or defrauded by her husband. But all the facts appear here, and there is nothing from which such a presumption can arise. At the time of the execution of the obligation of February 18, 1881, Mr. Tallinger was about seventy-two years old, and it was impossible on the twentieth of July thereafter to estimate precisely the value of that obligation. It was conditioned upon performance of several things by the plaintiff. Its value depended, to a large extent, upon the length of the testator's life, and of the adequacy of his property at death. Under such circumstances, it is not apparent that \$5,000, in hand paid, was not a fair equivalent for the release of the obligation. There is no allegation in the complaint that she was overreached or defrauded, or that the amount paid her was not adequate. But, even if the plaintiff had been overreached by being induced to surrender the prior obligation, and to take in lieu thereof \$5,000 in money, she was in no condition to succeed in this action. The defendants did not admit the liability of the testator upon the obligation of February eighteenth, but disputed it, and alleged that she had violated the conditions mentioned therein, and that she was not, therefore, entitled to recover anything. Under such circumstances, before she could recover upon the original instru-

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ment, she should have repudiated the subsequent agreement of July twentieth, and should have tendered back the \$5,000. It is not a case where, upon the undisputed facts, the plaintiff would be entitled to recover something, either under the original obligation or the substituted agreement. The executors denied their obligation to pay anything, and, in such a case, it was the duty of the plaintiff to restore the \$5,000, that the litigation could thereafter be carried on solely upon the liability of the defendants under the original agreement. (*Gould v. Cayuga Nat. Bk.*, 86 N. Y. 75.)

The judgment should, therefore, be affirmed, with costs.

All concur.

Judgment affirmed.

113	434
115	360

113	434
152	565
152	576

113	434
168	219

In the Matter of the Judicial Settlement of the Account of
BENJAMIN ALBERTSON et al., as Executors, etc.

De B. died in 1878, leaving a widow, but no descendants. By his will he gave his residuary estate to trustees named, in trust, to apply the rents, income and profits to "the sole use" of his wife during her life; after her death he directed his trustees to pay out of the capital of the trust estate certain legacies "and to convey, transfer and distribute the remainder of the capital" to certain persons named. He empowered the trustees "to sell the whole or any part of the real estate belonging to such trust estate." He directed that "the proceeds of such sales * * * shall be held and managed by the said trustees * * * upon the same trusts and for the same purposes and be disposed of in the same manner as such real estate would in case of no such sale." It was provided, however, that the trustees should not sell the testator's farm during the lifetime of his wife except with her consent, to be signified by her joining in the deed, and that she should be permitted to use and occupy the farm free of rent so long as she lived. He also directed the trustees during the time that his wife so used and occupied the farm to pay out of the estate "all taxes upon said farm and the expenses of keeping the buildings thereon in proper repair, and all other expenses attending the proper upholding and maintaining of the same, and also the interest upon any and all mortgages which shall be upon said farm at the time of his death." During the widow's lifetime the trustees paid the interest accruing upon a mortgage on the farm and the insurance premiums,

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taxes, etc., from the income of the estate in their hands. On their accounting these charges were objected to by the executors of the widow on the ground that the items were chargeable to the capital of the estate. *Held*, untenable; that the words, "pay out of my estate" were not, in themselves, sufficient to support the construction contended for, as the other parts of the will disclosed an intention to preserve intact the *corpus* of the estate for the ultimate disposition arranged with respect thereto upon the death of the life-tenant.

To sustain a construction of a will, whereby the capital of a trust fund may be impaired by using it in payment of taxes and of interest on mortgages and in maintaining the realty used by the life-tenant, it must contain words of the most unmistakable import pointing unequivocally in that direction.

Mem. of decision below, 46 Hun, 566.

(Submitted March 28, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 13, 1887, which modified the decree of the surrogate of Queens county settling the accounts of Benjamin Albertson and Garret J. Garretson, as executors and trustees of John R. De Bevoise, deceased, and affirmed it as modified.

The said testator died June 5, 1878, leaving his widow, Sarah, him surviving; but no descendants. His widow died August 2, 1881. The fourth, or residuary clause of his will, is as follows, viz.:

"*Fourth.* All the rest, residue and remainder of my estate, real and personal, which I shall own at my death or of which I shall die seized or possessed, or to which at my death I shall be in any way entitled, and wheresoever situated, I give, devise and bequeath unto my friends Benjamin W. Albertson and Garret J. Garretson, and the survivor of them and the successors of such survivor. *In trust*, nevertheless, for them *during the lifetime of my wife, Sarah De Bevoise, to collect and receive the rents, issues, income and profits thereof and to apply such rents, issues and incomes and profits to the sole use of my said wife Sarah during her life.* And upon the out of the trust, upon the death of my said wife Sarah, to pay out of the capital of the said trust estate, the legacies men-

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tioned in the third article of this my will, or such of said legacies as may not then have lapsed from any cause, *and to convey, transfer and distribute the remainder of the capital of said trust estate or the securities in which the same may then be invested to*, between and among my niece, Eveline De Bevoise Boice, wife of Richard Boice, and my nephews, Charles R. Hegeman, Rem. Hegeman and James Gilbert De Bevoise, and the issue of any of my said last four named niece or nephews who may have died before my said wife, and left issue who shall survive my said wife, in equal shares or proportions, *per stirpes* and not *per capita*, to be thenceforth had and held by them, their heirs, executors, administrators and assigns forever."

By the "fifth" paragraph testator empowers "*the trustees of this, my will, appointed of the estate, devised and bequeathed as aforesaid, for the use and benefit of my wife Sarah, during her life*, to sell the whole or any part of the real estate belonging to such trust estate."

* * * "It is my will, and I do hereby direct, that the proceeds of such sales, and the securities in which such proceeds may be invested, shall be held and managed by the said trustees, or their successors, upon the same trust and for the same purposes, and be disposed of in the same manner as such real property would in case of no such sale by the force of the previous provisions of this, my will. * * *"

By a further paragraph, a provision is made respecting his farm, which reads as follows, viz.:

"*Sixth.* It is my will that my said trustees shall not sell my farm in the town of Jamaica, whereon I now reside, under the power of sale hereinbefore given to them, during the lifetime of my said wife Sarah, except with her consent, to be signified by her joining in the execution of a deed of conveyance of the same, and that, if my said wife shall so desire, she be permitted to use and occupy said farm free of rent so long as she shall live; and I direct that my said trustees shall, during the time that my said wife shall so use and occupy

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said farm, pay out of my estate from time to time, as the same shall accrue or become necessary, all taxes upon said farm, and the expenses of keeping the buildings thereon in proper repair, and all other expenses attending the proper upholding and maintaining of the same; and also the interest upon any and all mortgages which shall be upon said farm at the time of my death."

During the widow's lifetime the testator's executors paid the interest accruing upon a mortgage covering the farm, and the insurance premiums and the taxes, etc., on the same, from the income of the estate in their hands. Upon their accounting, objection was made to such portions of the account as covered such charges to the income, by the executors of the widow, Sarah, on the ground that these items were chargeable to the capital of the estate. The surrogate sustained the objection, and held the payments in question chargeable to capital account. The General Term held that these payments were chargeable to income

Henry A. Monfort for appellants. Ordinarily, where there is an estate for life and a remainder in fee, the life tenant is bound to pay taxes, interest upon any mortgage upon the property and the expenses of ordinary repairs; but this rule is liable to be changed by the creator of the two estates. The question is as to the intention of the testator. (*Mosely v. Marshall*, 22 N. Y. 200.) By the words "my estate," the testator intended the property that he should die seized of. "Estate" ordinarily signifies the *corpus* of the property. (2 Jarman on Wills [Big. ed.] *276.) A well-known rule of construction requires, in all cases, that the language of a will shall receive a construction which will give to every expression some effect, rather than one that renders any of the expressions inoperative. (2 Jarman on Wills, *842, rule 16.)

George G. Dutcher for respondents. The beneficial interest of the widow under the will of the testator was the right to the net rents, issues, income and profits of the trust estate.

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(*Matter of Accounting of Mason*, 98 N. Y. 527; *Whitson v. Whitson*, 53 id. 479; *Pinckney v. Pinckney*, 1 Bradf. 269; *Bates v. Underhill*, 3 Red. 365; *Reynolds v. Reynolds*, 3 Dem. 84; *Stubbs v. Stubbs*, 4 Red. 170; *Florence v. Sands*, Id. 206; *Freeman v. Freeman*, Id. 211.) By the widow's electing to retain the use and occupation of the "Homestead Farm," she was, in that respect, a life tenant. (1 R. S. 727, §§ 47, 48, 49; *De Witt v. Cooper*, 18 Hun, 67.) The widow, as such life tenant, was obliged to pay the interest on mortgage, taxes, repairs, and all other expenses attending the upholding of the "Homestead Farm," unless there be some plain, unequivocal direction in the will that those charges shall be paid from the *corpus* of the estate. (*Matter of Accounting of Mason*, 98 N. Y. 527; *Whitson v. Whitson*, 53 id. 479; *Mosley v. Marshall*, 22 id. 200; *De Witt v. Cooper*, 18 Hun, 67; *Parkinson v. Parkinson*, 2 Bradf. 77-79; *Lawrence v. Holden*, 3 id. 142; *Peck v. Sherwood*, 56 N. Y. 615; *Lansing v. Lansing*, 45 Barb. 182; *Deraismes v. Deraismes*, 72 N. Y. 154.) The sole object to be accomplished by the "sixth" paragraph of the will was that the widow should have the right to the possession and use of the "Homestead Farm," together with the stock, etc., for life, at her option, instead of the trustees retaining the possession and control and paying the widow the net income therefrom. (1 Redfield on Wills, 483, § 4.) The payment of the net income to the widow during her life, as far as appears, was received by her without objection, and, therefore, with her assent and concurrence; and she having acquiesced in such construction of the will and accepted the payments in accordance therewith, and her legal representatives never having made any objection until more than five years after her decease, they are now estopped from objecting to the same. (*In re Gerry*, 103 N. Y. 445.) Where there is any doubt as to the meaning and intention of the testator, the courts are always inclined to favor blood relations to that of strangers in construing ambiguous clauses in wills. (*Quinn v. Hardinbrook*, 54 N. Y. 83.)

Opinion of the Court, per GRAY, J.

GRAY, J. To change the general rule that, as between the life tenant and the remainderman, the former is bound to pay the taxes imposed, and the interest accruing upon a mortgage, a very clear expression of such an intention on the part of the testator must be found in his will. The usual purpose of the testator in providing for a beneficial interest in a trust estate is, that the net income shall be applicable only, and that the *corpus*; or capital, of the trust estate shall remain intact until the trust shall have determined. The principle has been so long and firmly established that interest on mortgages, taxes, repairs and all those current expenses, which are fairly incidental to the maintenance of the realty used by a life tenant, are payable by him, that it should be adhered to upon all occasions, unless, in so doing, we violate a plain direction to the contrary; which, if not found in the will in so many words, yet is the only one which a fair and reasonable construction permits of our finding. What do we find in the present will which warrants our enlarging the provision of the fourth clause in favor of the widow? By that clause a trust is created, comprehending all of the residuary estate remaining, after paying debts and expenses incidental to administration; and the rents, issues, income and profits received by the trustees are to be applied to the sole use of the widow for her life. Although the direction there is not, in words, to apply the *net income*, etc., received by the trustees, the omission is supplied by the rules of construction, and net income only is applicable to the beneficiary. But, in the sixth paragraph of the will, where the right to use and occupy the Jamaica farm, free of rent, is given to the widow, so long as she lives, occur words, which the appellants insist upon as containing an unequivocal expression by testator of an intention that, pending her occupation, the trustees are to appropriate from the capital of the estate the sums required to keep down all taxes, interest, repairs, etc., upon the property. The words are: "If my said wife shall so desire, she be permitted to use and occupy said farm free of rent so long as she shall live; and I direct that my said trustees shall, during the time that my said wife shall

so use and occupy said farm, pay out of my estate, from time to time as the same shall accrue or become necessary, all taxes upon said farm, and the expenses of keeping the buildings thereon in proper repair, and all other expenses attending the proper upholding and maintaining of the same; and also the interest upon any and all mortgages which shall be upon said farm at the time of my death." This permission to his widow to use the farm qualified the previously given authority to sell the testator's realty, by excepting so much of it in the contingency mentioned.

In my opinion the insertion of the words "pay out of my estate" in the sixth clause, is not, in itself, sufficient to support the construction contended for by these appellants. Such an expression is quite as consistent with the idea that the income shall be resorted to, as that the capital of the trust fund shall be diminished for the purpose. If we refer to the other parts of the will, they disclose rather an intention to preserve intact the *corpus* of the estate, for the ultimate disposition arranged with respect to the residuary estate, upon the death of the life tenant. That disposition is the transfer to his niece and nephews of so much of the capital of the trust estate as shall remain after the payment of certain legacies, given by the third clause of the will, and which are postponed in payment until the death of the widow. These words are not without importance, viz., "*to pay out of the capital of said trust estate the legacies * * * and to convey, transfer and distribute the remainder of the capital of said trust estate.*" To sustain a construction, whereby the capital might be more or less seriously impaired, by using it in the payment of taxes and of interest on the mortgage, and in maintaining the realty used by the beneficiary, we ought to find words of the most unmistakable import and pointing unequivocally in that direction. In the fifth clause the understanding of the testator that his widow should only have the use or benefit of the income of the estate seems evidenced, when he speaks of the trustees as "appointed of the estate devised and bequeathed as aforesaid for the use and benefit of my wife Sarah during her life."

Opinion of the Court, per GRAY, J.

In the same clause he provides that the proceeds of any sales, made under the power conferred, "shall be held and managed by the said trustees or their successors, upon the same trust and for the same purposes and be disposed of in the same manner as such real property would in case of no such sale by the force of the previous provisions," etc. I do not think to concede to the words in the sixth clause, "pay out of my estate," the force and meaning that appellants contend for would be consistent with the manifest plan of the will; and, unless we can find authority for such a concession by a general reading and view of the instrument, we should not allow possibly ambiguous words and expressions to change an established rule of construction, or to defeat what seems to be elsewhere rather a different intent of the testator.

It may be said that the widow, or life tenant, in occupying the farm, would have been bound, by the general rule in such cases, to keep down these current charges, and that these words in the sixth clause were unnecessary. That may be true and yet the force of the rule remain unaffected. We may consider the language as surplusage, or as an instruction to the trustees. They may have been precautionary in their use. The fact that she would legally have been bound to pay these charges is no reason why the testator should not specifically direct his trustees to see to their payment from the revenues of the trust fund. He had just given her the beneficial interest in the revenue from his whole estate, of which this farm was a component part. Upon extending to her the option of using and occupying the farm, and thus withdrawing it from the control of the trustees, the testator, in directing them to pay the taxes, interest and other expenses of maintenance, merely provided against the possibility of an accumulation of such liens and of serious deterioration in value; whether from neglect, or from any other cause, and thereby insured the preservation of his residuary estate for the ultimate purposes specified.

I think the views I have expressed better harmonize with

Statement of case.

the general scheme of this will and work out the more equitable result. I, therefore, advise that we affirm the judgment of the General Term, with costs to the respondent, to be paid out of the estate.

All concur.

Judgment affirmed.

113	442
189	800
113	442
146	823

GEORGE B. COLLYER, Respondent, v. CHARLES S. COLLYER, Administrator, etc., Appellant.

Before a recovery can be had in an action for use and occupation of real estate, it must be made to appear that the conventional relation of landlord and tenant existed between the parties; and while the possession and beneficial enjoyment of real property, with the consent of the owner, is ordinarily sufficient to sustain an action upon an implied agreement for use and occupation, such an agreement may not be implied where the circumstances attending the use and occupation show clearly there was no expectation of rent by either party.

So, also, where a person lives with a relative as a member of the family under circumstances showing clearly that there was no expectation on either side that board should be paid, the law will not imply a promise to pay board.

(Argued March 29, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made at the December Term, 1887, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee on reference of a disputed claim against an estate.

The facts, so far as material, are set forth in the opinion.

Calvin Frost for appellant. The conventional relation of landlord and tenant must be shown to have existed between the respondent and his sister, in order to render an action for use and occupation maintainable. (*Williams v. Hutchinson*, 3 N. Y. 317; *Preston v. Hawley*, 101 id. 588; *Benjamin v. Benjamin*, 5 id. 387; *Carpenter v. Weller*, 15 Hun, 135; *Lyon v. Smith*, 35 id. 275; *Ross v. Ross*, 6 id. 184; *Roe v. Boyle*, 81

Statement of case.

N. Y. 305; *Morey v. Pelt*, 88 id. 453; *Townsend v. N. Y. Life Ins. Co.*, 4 N. Y. Civ. Pro. R. 398.) A person cannot perform services, intending them to be gratuitous, and with a tacit understanding that no pecuniary charge is to be made, and afterward recover on a *quantum meruit* for such services. (*Moore v. Moore*, 3 Abb. Ct. App. Dec. 303; *Bowen v. Bowen*, 12 Bradf. 336; *Robinson v. Cushman*, 2 Denio, 152; *Everts v. Adams*, 12 Johns. 352; *Sharp v. Cropsey*, 11 Barb. 224; *Raynor v. Robinson*, 36 id. 128; *Green v. Roberts*, 47 id. 521; *Wilcox v. Wilcox*, 48 id. 327; *Van Kuren v. Saxton*, 5 T. & C. 566; *Sullivan v. Sullivan*, 6 Hun, 658; *Hewitt v. Bronson*, 5 Daly, 1.) If the intestate was liable for use and occupation, there is no proof that there was any demand upon her or any particular time for payment, hence no interest could be charged prior to such date of demand. (*Sellick v. French*, 1 Am. Lead. Cas. 626; *Feeter v. Heath*, 11 Wend. 486.) The action for use and occupation is alone authorized by statute. (1 R. S. 739, § 26.) The claim under this statute is for damages, which, in the absence of an agreement, must necessarily be unliquidated, and upon such no interest can be allowed. (*White v. Miller*, 78 N. Y. 393; *Holmes v. Rankin*, 17 Barb. 454; *De Witt v. De Witt*, 46 Hun, 258.)

Richard L. Sweezy for respondent. There have been cases where claims for board between near relatives have been sustained as upon an implied promise. (*Gilbert v. Comstock*, 93 N. Y. 484; *Webster v. Nichols*, 21 Week. Dig. 566; *Reynolds v. Robinson*, 82 N. Y. 106.) Even a tenant in common renting out the premises is liable to his co-tenants. (*Roseboom v. Roseboom*, 15 Hun, 309; *Joslyn v. Joslyn*, 9 id. 388; *Coakley v. Mahar*, 36 id. 157.) Possession and beneficial enjoyment of real property with permission of the owner is sufficient to sustain an action upon an implied agreement for use and occupation. (*Osgood v. Dewey*, 13 Johns. 240; *Coit v. Planer*, 4 Abb. Pr. [N. S.] 140; *Baxter v. West*, 5 Daly, 460; 1 Cowen's Tr. [2d ed.] 47.) If there was an understanding that plaintiff was to be compensated

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by will, then, upon failure of the deceased to leave such will, plaintiff is entitled to recover compensation as a creditor. (*Robinson v. Raynor*, 28 N. Y. 494; *Reynolds v. Robinson*, 64 id. 589; 82 id. 104.)

EARL, J. Elizabeth Collyer, a sister of the plaintiff, died March 4, 1883, intestate. At the time of her death she was about sixty years of age and had never been married. She left personal estate which was inventoried at about \$70,000. The defendant was appointed her administrator and thereafter the plaintiff presented to him a claim against her estate for rent of a house in the city of New York, known as No. 81 Lexington avenue, and for rent of a house in Sing Sing, and for board and other matters, amounting in all to \$9,547.91. The claim was disputed by the defendant and was referred by consent of the surrogate. It was thereafter brought to trial before the referee and he allowed for rent of the Lexington avenue house, with interest, \$4,457.48, and for rent of the house at Sing Sing, with interest, \$660.40, and for board and other items, amounting in all to \$5,948.70. The report of the referee was confirmed and judgment entered thereon, and that judgment, upon appeal to the General Term, has been affirmed.

The largest share of the claim allowed was made up of the rent of the two houses mentioned. The claim of the defendant is that his intestate occupied them under such circumstances that she never became liable for any rent, and whether or not that claim is well founded is the principle question to be determined upon this appeal.

The plaintiff and the intestate and their mother lived together as one family in the Lexington avenue house until the decease of the mother in 1865, after which time the plaintiff and the intestate resided alone there, she attending to the household duties without the aid of a domestic, while the plaintiff furnished and paid for all needed supplies. In 1873 the plaintiff married a lady much his junior. Some months after that he and his wife ceased to live in the house, and the intestate resided there alone. The house contained much old furniture,

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some of which formerly belonged to plaintiff's mother, and some of it belonged to him and some to the intestate. The furniture was piled up in some of the rooms of the house, and the intestate used but a small portion of it, and occupied but a small portion of the house. The plaintiff's wife was a witness for him and gave the following description of the Lexington avenue house as she found it in October, 1873, when she went there with her husband to live:

"When I first went to stay at all at the Lexington avenue house, after I was married, there was no furniture visible, except a few broken chairs, and everything else compared with them. The basement had no furniture in it. When I remained there over Saturday night and Sunday we ate in the kitchen in the back basement. That had a very little furniture in it. * * * The front basement had no furniture in it at all; it had no carpet on; a few old broken chairs stowed away. That is all there was on that floor, that I have described, the basement floor. The parlor floor was furnished with three cane-bottomed chairs and an old carpet and a hair-settee. There were two rooms on the parlor floor. I can't say anything about the front room; the front room was locked. I had no sight of that whatever. * * * The back parlor contained an old rocking-chair, a hair-settee, a mirror, a few pictures; I guess that is all; I only know of one room being furnished on the floor above the parlor. That is the only room on the second floor that I was ever in. It contained a small desk, an apology for a writing-desk, used not very often, occasionally by Mr. Collyer. It also contained a bed and three chairs, no bureau, an old broken washstand—this is the back room. The front room on the second floor was locked all the time I was there. I saw through the door of it a promiscuous gathering of everything—beds, chairs—a sort of junk-shop. I would not say positively there was a bureau; there might have been. When I passed by I could see the things piled up to the ceiling at one end of it. I can't say about the entire room, because I didn't see. I merely saw through a chink. The door stood ajar about six inches. This room, in which the

Opinion of the Court, per EARL, J.

furniture was piled, was occupied by Miss Collyer. She slept in that room."

Whenever the plaintiff had occasion to go to the city on business of his own he would stop at the Lexington avenue house with his sister. He paid for her groceries and the supplies furnished to the house. She kept no servant and lived in the most parsimonious and penurious way. She occasionally rented some of the rooms in the house, as she said, for the purpose of getting some money. She continued to live in the house, after the marriage of George, until the spring of 1879. There was never any talk between her and him about rent. It does not appear that she requested permission to occupy the house, or that the plaintiff gave her express permission, or that any arrangement whatever was made about it. The plaintiff gave proof, showing, beyond all question, that she did not suspect that she was there as his tenant, under obligation to pay rent, and the circumstances were such that he must have known how she understood it. If he allowed her to continue in the occupancy of the house, knowing that she did so with the understanding on her part that she was to pay no rent, the law will not raise in his favor an implied promise on her part to pay it. Before the plaintiff can recover for the use and occupation of the house, he must show that the conventional relation of landlord and tenant existed between him and his sister. (*Benjamin v. Benjamin*, 5 N. Y. 383; *Preston v. Hawley*, 101 id. 586.) There must be proof, either that such relation was created by express contract, or there must be proof of circumstances from which the law will raise an implied contract. But the law will not imply a contract contrary to the intention of the parties. There is not an atom of proof in this case that the plaintiff ever expected any rent, or that the intestate ever expected to pay any. The irresistible inference from all the proof is that she occupied and had the use of the house, or so much of it as she desired for her manner of living, free of rent. It is entirely clear, that if she had supposed that she was occupying the entire house, consisting of three stories, as a tenant, and

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that she was expected to pay at the rate of \$1,000 a year for the rent thereof, she would not have remained there a day. Although the intestate lived four years after she left that house, always abundantly able to pay, it does not appear that the plaintiff ever claimed any rent of her, or even mentioned the matter of rent to her.

Not only did the evidence not warrant a finding that the conventional relation of landlord and tenant existed between the plaintiff and the intestate, or that she ever agreed or expected to pay any rent, or that the plaintiff ever expected to receive any, but there is no finding of any of these facts, except that the intestate had the use and occupation of the house during the time mentioned. Upon such evidence, we think, there was no warrant for a finding that the intestate ever became obligated to pay the plaintiff any rent. He gave her the use of the house; he allowed her to live there, and to rent a portion of it without any expectation of compensation on his part; and, hence there was error of law in ordering a recovery in his favor for the rent and interest thereon.

As to the Sing Sing house, that was a large brick house, three stories and an attic high above the basement. One of plaintiff's witnesses testified that the intestate told her, in the spring of 1879, that "she was going to Sing Sing; that her brother had offered her a home there." The plaintiff testified that "in the spring of 1879 she did not go to Sing Sing directly; she went and hired a room down in Broadway alley, and when she found she had to pay rent, she went to Sing Sing; probably two weeks; she then went to Sing Sing to the house where I lived, and remained there until she died."

When she first went to Sing Sing the plaintiff and his wife were living in the brick house, and for four months she lived in their family. Then the plaintiff and his wife went away, leaving her in the house. They returned again early in December of the same year, and remained there until July, 1880, during which time the intestate lived with them, and they then again went away, and she remained there nearly all the time until her death. The house contained furniture of the plaintiff

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and some furniture belonging to the intestate. She lived there alone, occupying a room or rooms in the attic or basement. She lived in a miserly, penurious manner, occasionally renting some rooms in the house. She occupied this house precisely as she did the Lexington avenue house, and the observations made about the occupancy of that house apply to this. All the evidence forbids an inference that there was any expectation of the payment of rent on either side. Under such circumstances reason and justice do not require that a contract to pay rent should be implied, and there can be no presumption contrary to the intention of both parties that the relation of landlord and tenant, either in fact or law, existed. It is true that the possession and beneficial enjoyment of real property with the permission of the owner is ordinarily sufficient to sustain an action upon an implied agreement for use and occupation. (*Osgood v. Dewey*, 13 Johns. 240; *Coit v. Planer*, 4 Abb. [N. S.] 140; *Baxter v. West*, 5 Daly, 460.) But where the use and occupation of real estate is under such circumstances as to show that there was no expectation of rent by either party, a contract to pay rent will not be implied, and this is such a case. There was, therefore, also error in awarding to the plaintiff rent for the Sing Sing house.

During the time above-mentioned, to wit, four months in the summer of 1879, and seven months, from December, 1879, to July, 1880, the intestate lived in plaintiff's family at the brick house in Sing Sing, and the referee allowed plaintiff for her board during those months at the rate of \$30 per month, amounting, with interest, to \$465.90. She lived with the plaintiff as a member of his family, and not as a boarder. There was no request for board and no arrangement whatever about it. The plaintiff proved that she said she was going there because "her brother had offered her a home there." It is entirely clear that she did not expect to pay for her board and that the plaintiff knew it. There can be no question that both parties understood that she was living there as his sister and as a member of his family; and under

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such circumstances the law will not convert her relations to him into that of a boarder, and imply a promise on her part to pay for board. (*Williams v. Hutchinson*, 3 N. Y. 317; *Ross v. Ross*, 6 Hun, 184; *Carpenter v. Weller*, 15 id. 134; *Lyon v. Smith*, 35 id. 275.) There was, therefore, error in the allowance made to the plaintiff for the board of the intestate.

It is undoubtedly true that the plaintiff showed great kindness and liberality to his sister. But no one can read this evidence and draw therefrom any inference that he expected any reward from his sister during her lifetime. He knew that she was to the utmost degree penurious and miserly, and that she would hoard her pelf and cling to her property so long as she lived. He doubtless expected that by his kindness to her she would be induced to make a favorable disposition of her property in his favor at her death. The fact that his expectation has been disappointed furnishes no ground for now stamping what at the time were acts of kindness and generosity with the mercenary features of contract and compensation.

We see no reason to doubt that the allowances made by the referee for the other items of plaintiff's claim were properly made; but for the errors above mentioned the judgment of the General Term and that entered upon the report of the referee should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

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Statement of case.

GILES H. G. FOWLER, as Executor, etc., Respondent, v. THE BOWERY SAVINGS BANK, Appellant.

J. deposited a sum of money with defendant in trust for E., his wife, plaintiff's testatrix. A pass-book was delivered to him. After the death of both husband and wife and the issuing of letters testamentary to plaintiff, he called with them at defendant's bank and demanded payment of the deposit; he was told by one of its officers that it would be paid to him when he came with the pass-book which was then in possession of the executor of J.; thereafter the latter presented the pass-book, together with proof of his appointment, and thereupon defendant paid the deposit to him on surrender of the pass-book. In an action to recover the sum deposited it appeared that plaintiff, after learning of the payment, brought suit against J.'s executor to recover the money so paid and recovered judgment therein, and being unable to collect the same, brought this action. *Held* (RUGER, Ch. J., dissenting), that plaintiff had an election of remedies, i. e., either an action against defendant to recover the deposit, or an action against J.'s executor for money had and received; but he was not entitled to both, and by electing the latter remedy he lost the former, as by so doing he adopted and ratified the action of defendant in making the payment, and this would be a good defense in an action by defendant against J.'s executor to recover back the money paid to him.

It seems that if the money had been left on special deposit, plaintiff could have pursued it in the hands of said executor without losing his remedy against defendant.

Where a trustee is bound to pay money to a beneficiary as a debt, if he makes payment to another person, this is not a payment of the debt and the moneys paid are not the property of the beneficiary.

In such case the beneficiary may ignore the payment and sue the trustee as his debtor, or he may ratify and adopt the payment and sue the person who received the money, but he cannot do both, and his election, once effectually made, is conclusive upon him.

The defense that the payment by the bank had been adopted and ratified by plaintiff was not set up in the answer. This objection was not raised upon the trial, and all the facts pertaining to such defense were proved without objection and were found by the court. *Held*, that the objection was not available here.

Fowler v. Bowery Sgs. Bk. (47 Hun, 399) reversed.

(Argued March 13, 1889; decided April 23, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 13, 1888, which affirmed a judgment in

113 450
121 170
113 450
122 436
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127 38
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141 449
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159 172
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163 470
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170 515
113 450
77 AD 513

Statement of case.

favor of plaintiff, entered upon a decision of the court on trial without a jury.

The nature of the action and the material facts are stated in the opinion.

Carlisle Norwood, Jr., for appellant. The relation between a bank and its depositor is simply that of debtor and creditor. (*People v. M. & T. Sav. Inst.*, 92 N. Y. 7; Laws 1834, chap. 229, § 6; Laws 1875, chap. 371, § 23; Laws 1882, chap. 409, § 257.) Mrs. White or her executor was not entitled to payment from the bank, but the bank was right in paying to the executor of its depositor. (*Martin v. Funk*, 75 N. Y. 134, 142; *Willis v. Smythe*, 91 id. 297; *Mabie v. Bailey*, 95 id. 209, 211; *Boone v. Citizens' Sav. Bk.*, 84 id. 83.) Upon the death of John White his title as trustee devolved upon his executor, and as such executor he became, at law, immediately chargeable with all personal property held in trust by his testator, not merely as executor for the purposes of administration, but as successor in law to the deceased as a trustee, and it became his duty to take immediate possession of and to hold such fund, not as assets, but subject to the same trust as his testator and predecessor in the trust had held it. (*Wetmore v. Hegeman*, 88 N. Y. 69, 72; *Boone v. Citizens' Sav. Bk.*, 84 id. 83; *Banks v. Exrs. of Wilkes*, 3 Sand. Ch. 108; *Bunn v. Vaughlin*, 1 Abb. Ct. App. Cas. 253; *Emerson v. Bleakley*, 2 id. 22, 27; *Trecothick v. Austin*, 4 Mason, 16, 29; *Dias v. Brunnell's Exrs.*, 24 Wend. 8, 13; *Moses v. Murgatroyd*, 1 Johns. Ch. 119.) Where a party has a choice to affirm or to disaffirm the act of a third party, and affirmance involves an assertion of rights inconsistent with disaffirmance, or *vice versa*, the choice having been once made and a remedy invoked, the election is conclusive, and the party cannot thereafter assert a right or invoke a remedy predicated upon such affirmance or disaffirmance. (*Rawson v. Turner*, 4 Johns. 470, 474; *Rodermund v. Clarke*, 46 N. Y. 354; *Scarf v. Jardine*, 7 App. Cas. 345; *Riley v. Albany Sav. Bk.*, 36 Hun, 513, 522; 103 N. Y. 669; *Morris*

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v. *Rexford*, 18 id. 532; *Boots v. Ferguson*, 46 Hun, 129; *Fireman's Ins. Co. v. Lawrence*, 15 Johns. 46, 56; *Bk. of Beloit v. Beall*, 34 N. Y. 473; *Bowen v. Mandeville*, 95 id. 237, 239; *Molla v. Tusca*, 87 id. 166, 169.)

Eugene Burlingame for respondent. The deposit made by John White for his wife, Elizabeth White, made him a trustee for her, and transferred any title he may have had to the funds from him personally to him as trustee, and passed the title to said deposit to Elizabeth White, and the plaintiff, as her representative, was entitled to the possession of the fund. (*Martin v. Funk*, 75 N. Y. 134; *Willis v. Smith*, 91 id. 297; *Martin v. Bailey* 95 id. 209; 13 Week. Dig. 493; *Mulcahey v. Em. Ind. Sav. Bk.*, 89 N. Y. 435.) The plain duty of the bank in this case was to pay the plaintiff. (69 N. Y. 314; 62 id. 12; 9 Week. Dig. 73; 40 Conn. 512.) At the time of the death of Elizabeth White she was the legal owner of the moneys so deposited as aforesaid in the defendant's bank. (*Martin v. Funk*, 75 N. Y. 134; 31 Am. Rep. 446.) The trust once established, and no power of revocation having been reserved, it was irrevocable. (*Minn v. Rogers*, 40 Conn. 512; 16 Am. Rep. 69; *Martin v. Funk*, 75 N. Y. 134; 95 id. 211.)

EARL, J. On the 15th day of November, 1871, John White, the husband of Elizabeth White, deposited with the defendant, in trust for his wife, the sum of \$805.93, and the deposit was entered upon a pass-book, which was delivered to him, in this way: "Bowery Savings Bank in account with John White for Elizabeth White." This deposit remained in the bank during the lifetime of John White, who died November 13, 1882, leaving a will wherein he appointed John D. Flynn his executor. The will was admitted to probate and letters testamentary were granted to Flynn on the 23d day of January, 1883. Elizabeth White died December 18, 1882, leaving a last will and testament in which the plaintiff was named as executor, which will was admitted to probate and letters testamentary were issued to the plaintiff on the 11th day of January,

1883. On the twenty-fifth day of January, the plaintiff, with his letters testamentary, called at the savings bank and notified it of his appointment as executor, and demanded payment of the deposit. He was told by one of its officers that the money would be paid to him when he came with the pass-book, which was then in the possession of Flynn, the executor of John White. Thereafter, on the twenty-ninth day of January, Flynn having in his possession the pass-book, presented the same to the defendant, together with proof that he had been appointed executor of John White and demanded payment of the deposit; and the defendant thereupon paid the same to him, and the pass-book was surrendered to it. Thereafter, on the same day, the plaintiff called on the defendant again in reference to the deposit and was informed that it had been paid to Flynn. This action was commenced in June, 1886, to recover the sum deposited with the defendant and interest thereon.

It is clear that the plaintiff was legally entitled to receive payment of the deposit from the defendant, and that after the notice and demand by him it had no right whatever to pay the same to Flynn; and, but for facts yet to be stated, the cases of *Martin v. Funk* (75 N. Y. 134); *Willis v. Smyth* (91 id. 297); *Mabis v. Bailey* (95 id. 209), would be ample authority for the maintenance of this action. After payment by the defendant to Flynn, the plaintiff, in the fall of 1883, commenced an action against him to recover, among other things, the money thus paid. Issue was joined and the action was tried in the fall of 1884, and a verdict was rendered in favor of the plaintiff and a judgment was thereon entered. The plaintiff was unable, however, to collect anything on the judgment, and he thereafter commenced this action.

The relation between a savings bank and a depositor therein is that of debtor and creditor, and the defendant, therefore, became a debtor for the sum deposited with it by John White. (*People v. Mechanics and Traders' Savgs. Institution*, 92 N. Y. 7.) After his demand of the deposit, and the payment of the money to Flynn, there were two remedies open to the plaintiff: He could sue the defendant as a debtor for the

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deposit and recover the amount thereof from it, or he could bring an action for money had and received to and for his use against Flynn, and recover it from him. But he was not entitled to both remedies at the same time, or in succession; and by electing the one he would lose the other. By electing to sue the bank he would repudiate its payment to Flynn, and his claim would be that the debt had not, in fact, been paid. By suing Flynn he would adopt and ratify the act of the bank in making payment to him, and his claim would be that the money due to him had, in fact, been paid to Flynn, and that Flynn had received it to and for his use. Such adoption and ratification of the payment would legalize the payment as between him and the bank, and thus discharge the bank. He could not occupy the position at the same time of claiming that the bank had paid his money to Flynn and yet that the bank was still his debtor. His election in this case to sue Flynn, and thus to treat him as his debtor, was not harmless to the bank, but in law may be presumed to have injured the bank, unless it should now be held to be discharged by its payment to Flynn. After the plaintiff commenced his action against Flynn, and thus ratified and adopted the payment by the bank to him, the bank could not, during the pendency of that action, have sued Flynn to recover back the money on the ground that it had been paid by mistake and received by him without authority, because it would have been a defense to such an action that the real owner of the fund had adopted and ratified the payment. But even if the mere commencement and pendency of the action by the plaintiff against Flynn would not have furnished such a defense, it is beyond doubt that if the bank should now bring an action against Flynn to recover back the money, he could successfully defend on the ground that the plaintiff had ratified and adopted the payment, and thus discharged the bank by the recovery of a judgment against him for the money paid as the real owner thereof.

The two remedies, one against Flynn and the other against the bank, are not concurrent. If the two actions could not be prosecuted at the same time, they could not in succession.

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Nothing could be more inconsistent than an action against Flynn, on the ground that money due to the plaintiff had been paid to him, and an action against the bank, on the ground that it had not paid the deposit and still remained debtor therefor. If the money had been absolutely the money of the plaintiff, left on special deposit with the bank, then he could have pursued the money wherever he could trace it without losing his remedy against the bank. In such a case the plaintiff would not be barred of his right of recovery against the bank until he had either recovered his money or the value of the same. All his remedies would be consistent, being based upon the theory of a wrongful disposition of his property. So, too, where a trustee, in breach of his trust, disposes of the trust property, the beneficiary of the trust may pursue it or its proceeds wherever he can trace them, so far as the law will permit him to do so, without relieving the trustee. All his remedies in such a case are consistent and based upon the same theory, to wit, a breach of trust. But if a trustee is bound to pay money to a beneficiary as a debt due from him to the beneficiary, then if he makes payment to another person, he has not paid the debt and the money paid is not, in fact, the property of the beneficiary. In such case the beneficiary may ignore the payment and sue the trustee as his debtor, or he may ratify and adopt the payment and sue the person receiving the money as his debtor, but he cannot do both. There is in such case a breach of trust, or not, as he may elect, and his election, once effectually made, is conclusive forever. (Comyns' Digest, Election, C. 2.) If one wrongfully takes and sells personal property not belonging to him, the owner has the election to sue him for the proceeds as money had and received to and for his use, and thus ratify the sale, or he may pursue the property and recover it or its value. But he cannot do both, and is bound by his election. (Pomeroy on Remedies, § 567 *et seq.*)

A few authorities may be cited to enforce these views. In *Priestly v. Fernie* (3 Hurl. & Colt. 977), it was held that where the master of a ship signs a bill of lading

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in his own name, and is sued upon it and judgment is obtained against him, an action will not lie against the owner of the ship upon the same bill of lading, although satisfaction has not been obtained on the judgment against the master. Baron BRAMWELL, writing the opinion, said: "If this were an ordinary case of principal and agent, where the agent, having made a contract in his own name, has been sued on it to judgment, there can be no doubt that no second action would be maintainable against the principal. The very expression that where a contract is so made the contractee has an election to sue the agent or principal supposes he can only sue one of them, that is to say, sue to judgment."

In *Scarfe v. Jardine* (7 App. Cas., L. R., 345) the facts were these: A firm of two partners dissolved, one retired and the other carried on the business with a new partner under the same style. A customer of the old firm sold and delivered goods to the new firm after the change, but without notice of it. After receiving notice he sued the new firm for the price of the goods, and upon their bankruptcy proved against their estate, and afterwards brought an action for the price against the late partner, and it was held that the liability of the late partner was a liability by estoppel only, and not jointly with the members of the new firm; that the customer might, at his option, have sued the late partner or the members of the new firm, but could not sue all three together; and that having elected to sue the new firm he could not afterwards sue the late partner. In that case Lord BLACKBURN said that the cases "are uniform in this respect; that where a man has an option to choose one or the other of two inconsistent things, when once he has made his election it cannot be retracted, it is final and cannot be altered. When once there has been an election to do one of two things you cannot retract it and do the other thing; the election once made is finally made." Lord WATSON said: "The plaintiff had the undoubted right to select his debtor, to hold either the old firm or the new firm responsible to him for the fulfillment of the contract; but I know of no authority for the proposition

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that the respondent could hold his contract to have been made with both firms, or that, having chosen to proceed against one of these firms for recovery of his debt, he could thereafter treat the other firm as his debtor."

In *Rawson v. Turner* (4 Johns. 469), it was held that if a new sheriff receives a prisoner from his predecessor, he is answerable for his escape, though a voluntary escape may have existed in the time of his predecessor; but the plaintiff has his election, either to consider the prisoner in execution, and so charge the new sheriff for the last escape, or as out of execution, and charge the old sheriff. If he has once made his election, and sued the old sheriff and recovered judgment against him, it is conclusive, and a bar to any action against the new sheriff.

In *Sanger v. Wood* (3 Johns. Ch. 416), Chancellor KENT said: "Any decisive act of the party, with knowledge of his rights and of the fact, determines his election in the case of conflicting and inconsistent remedies." In *Morris v. Rexford* (18 N. Y. 552), there was a bargain and sale of goods for cash, and the vendee took possession, but failing to make payment, the vendor obtained a redelivery of his goods by writ of replevin; and it was held that this was a disaffirmance of the sale and evidence in bar of a subsequent action for the purchase-money, and that the vendor having elected the one remedy, his right to pursue the other was extinguished. COMSTOCK, J., writing the opinion, said: "A vendor of goods on a sale and delivery upon cash terms, if he fails to get payment, may consider the delivery absolute and rely on the responsibility of the vendee, or he may disaffirm and reclaim his property. But he cannot do both of these things. The remedies are not concurrent, and the choice between them once being made, the right to follow the other is forever gone. The law tolerates no such absurdity as a seizure of goods by a person claiming that he has never sold them, and an action by the same person, founded on the sale and delivery of the same goods, for the recovery of the price.

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In peculiar circumstances a party may take either one of these courses, but having rightfully made his choice, the right to follow the other is extinct and gone." So here, the law will not tolerate the absurdity of holding that the plaintiff could sue Flynn on the ground that he had received money from the bank belonging to him, and at the same time sue the bank on the ground that it still remained his debtor, and that the money paid to Flynn was not his money and did not operate as payment.

In *Gardner v. Ogden* (22 N. Y. 327) it was held that the clerk of a broker, employed to sell land, having access to the correspondence between his principal and the vendor, stands in such a relation of confidence to the latter that, if he becomes the purchaser, he is chargeable as trustee for the vendor, and must reconvey or account for the value of the land; and the vendor having brought suit against both the broker and his clerk, making a claim against the broker for having fraudulently sold the land, and against the clerk for a reconveyance or accounting, the court said: "In the present case the plaintiff has elected to regard the purchaser as his trustee, and his complaint, as to him, proceeds on this basis. The plaintiff, therefore, elects to affirm the sale made to Smith. He cannot, *uno flatu*, affirm it as to him, and disaffirm it as to Ogden. * * * The affirmance of the sale by the plaintiff is a complete answer to the claim for damages against the firm for fraud in making the sale." In the *Bank of Beloit v. Beal* (34 N. Y. 473), it was held that, when a vendor, who has been defrauded in the sale of his goods, proceeds to judgment against the vendee upon the contract of sale, after he is apprised of the fraud, his election is determined, and he cannot afterwards follow the goods or the proceeds thereof into the hands of a third person on the ground of fraud; that if a principal, with a full knowledge of a fraud perpetrated by his agent, in the disposition of property purchased with his funds, prosecute the agent to judgment for the money so misappropriated, he thereby elects to treat the goods as the property of the agent, and cannot afterwards claim their proceeds in the hands of a third party.

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In *Rodermund v Clark* (46 N. Y. 354), W. and defendant were joint owners of a sloop. Defendant, ignoring W.'s rights, sold the whole vessel to M. W., after the sale, took and retained possession. M. thereupon libeled the vessel as owner in the United States District Court. She was seized by the marshal, and M. having obtained judgment by default, she was delivered to him. W. assigned his interest, and also his claim against defendant, to the plaintiff, who sued for conversion; and it was held that W., having elected to assert his rights by retaining possession and refusing to recognize the sale, he and his assignee were precluded from maintaining an action for the conversion; that where a party has an election between inconsistent remedies he is confined to the remedy which he first chooses. FOLGER, J., writing the opinion said: "W. had two courses, either of which he might pursue. He could sue the defendant for the conversion, or he could assert his right of possession, by keeping a permanent possession, or regaining possession if it was interrupted. The effectually taking of either of these two courses precluded him from taking the other." In *Bowen v. Mandeville* (95 N. Y. 237), it was held that where a party had been induced by fraud to enter into an executed contract for the purchase of property, he may either rescind and recover back the consideration paid, or affirm the contract and recover damages for the fraud; he cannot have both remedies, as they are inconsistent. In *Cheeseman v. Sturges* (9 Bos. 246), S., one of the defendants, held real and personal property in trust, to be used for the joint benefit of himself and the plaintiff and a third person, in specified proportions as copartners in a joint enterprise, and under an agreement that he was to make advances for carrying out the enterprise, and that all stocks or other securities than cash which should be received should remain undivided until a final settlement, and that he would not dispose of the property (other than money) without the consent of the others. He accordingly made large advances, and subsequently sold and conveyed all the property without the consent of the plaintiff and received

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therefor stock of an incorporated company; and it was held that the plaintiff by bringing an action, with full knowledge of these facts, in which he demanded a transfer of his share of the stock, and obtained an injunction against any disposal of it pending the action, must be deemed to have made his election of that remedy, and be treated as if he had consented to the sale.

In *Mattlage v. Poole* (5 Hun, 556) it was held, in substance, that where a vendor sells goods to the agent of an undisclosed principal, he may elect whether he will sue the agent for the price of the goods or the principal, but that he cannot have a recovery against both; and that where he has prosecuted the one to judgment he can have no recovery against the other. In *Riley v. The Albany Savings Bank* (36 Hun, 513), plaintiff's intestate, Mary Riley, had deposited with the defendant upwards of \$800. The money was paid to Flannagan during the lifetime of Mary Riley, upon the production by him of the pass-book and Mary Riley's check. It was claimed that, at the time of signing the check, Mary Riley was of unsound mind and incapable of executing the same. After Riley was appointed administrator he presented a verified petition to the surrogate, under section 2706 of the Code of Civil Procedure, charging Flannagan with having corruptly procured an order from Mrs. Riley, knowing her to be insane, and having drawn the money from the bank, and further averring that he then had the same in his possession, and praying that he be compelled to surrender the same to the petitioner. Flannagan appeared on the return of a citation and admitted that he obtained the money from the bank and that the same was in his possession, and a decree was entered directing him to deliver the same to the administrator. For his failure to comply therewith, he was committed to the county jail, where he remained until discharged therefrom by the surrogate, because of his inability from sickness to bear longer the confinement; and it was held that the administrator, by claiming in his petition and procuring a decree of the Surrogate's Court adjudging that the money in Flannagan's hands belonged to

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the estate of Mary Riley, ratified the act of Flannagan in drawing the money, and could no longer claim that the bank still owed to him the same money, or bring an action against it to recover the amount of the deposit; that the administrator had an election to treat Flannagan's act in drawing the money in two ways, viz., either to ratify or to disavow it; that having elected to ratify it, he could not thereafter disavow it. That case was appealed to this court and the order of the General Term reversing the judgment in favor of the plaintiff was here affirmed. (103 N. Y. 669.) The following authorities are to the same effect: *Curtis v. Williamson* (10 Q. B. [L. R.] 57); *Clark v. London, etc., Railroad Company* (7 Ex. [L. R.] 26); *Reymond v. Proprietors, etc.* (2 Metc. 319); *Lewis v. Carrier* (4 Allen, 339); *Cobb v. Knapp* (71 N. Y. 348); *Moller v. Tusca* (87 id. 166).

This extended examination of the authorities has seemed necessary on account of some difference of opinion upon the question considered which at first existed among the members of this court. It is seen that they justify the conclusion that plaintiff's election to sue and his recovery against Flynn furnished a defense of this action.

It is, however, objected, on the part of the plaintiff, that the defense that plaintiff had adopted and ratified the payment to Flynn is not set up in the answer; and such is the case. While the defendant alleges in its answer payment to Flynn, it does not allege that payment was made by the authority of the plaintiff or that he ratified or adopted it. But there was no such objection upon the trial. All the facts pertaining to that defense were proved without objection. There was no dispute about the facts, and they were found by the court. Hence the objection that the answer is defective is unavailing here.

We are, therefore, of opinion that the judgment should be reversed and a new trial ordered, costs to abide the event.

RUGER, Ch. J. (dissenting.) I am unable to concur in the opinion delivered in this case.

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I am of the opinion that the prosecution of Flynn by the plaintiff's intestate was not a ratification of the payment by the bank to him. Flynn, in obtaining such payment, neither represented or assumed to represent Mrs. White, and the bank did not pay the money to Flynn as the agent or representative of Mrs. White, but dealt with him as a claimant of the money in his own right. Under such circumstances there could be no ratification. Ratification is a branch of the law of agency, and cannot be held to have occurred unless there is a principal, and an act assumed to have been done by some one in his name or on his behalf. (Story on Agency, § 251; *Farmers' Loan and Trust Co. v. Walworth*, 1 N. Y. 433)

There were, consequently, no concurrent remedies and no occasion for an election by the plaintiff.

All concur with EARL, J., except RUGER, Ch. J., dissenting. Judgment reversed.

EMMA T. GREEN et al., Respondents, v. JOSEPH G. ROWORTH et al., Appellants.

While, where findings of fact by a court or referee are irremediably conflicting, this court will be governed by that finding which is most favorable to the appellant, it is the duty of the court to reconcile and give to each some office to perform, and it is only when this cannot, by a reasonable construction, be accomplished, that the rule has effect.

Although, as a general rule, fraud is not to be presumed, and a party seeking to relieve himself from an obligation on that ground must prove it, yet when the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality, and that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from over-mastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced or undue influence used, and that all was fair, open, voluntary and well understood.

Where, therefore, a father, an aged man, who had become much enfeebled, mentally and physically, took his two sons into partnership and turned over to them the management and control of his property and business

113 462
116 600

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130 417

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affairs, and was accustomed to rely upon their advice and counsel, and after they had already obtained from him the larger portion of his property without any adequate consideration, he, without consideration, in the absence of a legal adviser, executed to them a deed of his real estate in ignorance of its legal effect; the conveyance leaving the grantor comparatively destitute, *held*, that fraud was legally imputable to the grantees, requiring explanation from them; and this not having been given, that a finding of fraud and undue influence was justified.

(Argued March 28, 1889; decided April 23, 1889.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made December 6, 1886, which modified, and affirmed as modified, a judgment in favor of plaintiffs, entered upon a decision of the court on trial at Special Term.

This action was brought originally by William Roworth, among other things, to set aside two deeds of certain real estate executed by him to his sons, the defendants, Joseph G. and John W. Roworth, on the ground of fraud and undue influence. He having died during the pendency of the action, it was revived and continued in the names of the present plaintiffs, heirs-at-law of the deceased.

The facts, so far as material, are stated in the opinion.

Thomas Darlington for appellants. When the special findings of a judge differ from the findings formally made as the basis of the judgment, the appellant has the right to rely upon such findings as are most favorable to him. (*Tompkins v. Lee*, 59 N. Y. 662; *Schwinger v. Raymond*, 83 id. 192; *Bonnell v. Griswold*, 89 id. 122; *Redfield v. Redfield*, 110 id. 671, 673.) Undue influence must be proved, and cannot be presumed. The proof is made, in the first instance, when the relation and the personal intervention of the party claiming the benefit is shown. (*Clapp v. Fullerton*, 34 N. Y. 197-199; 95 id. 522; *Gardiner v. Gardiner*, 34 id. 155; *Septon v. Hopwood*, F. & F. 578; *Deane v. Negley*, 41 Penn. 312; *Marvin v. Marvin*, 4 Keyes, 22; *Small v. Small*, 4 Greenl. 220; *Trumbull v. Gibbons*, 2 Zabriskie [N. J.] 117; *Carroll v. Norton*, 3 Bradf. 320; *Tyler v. Gardiner*, 85

Statement of case.

N. Y. 610; *Howe v. Howe*, 99 Mass. 88; *Hagar v. Thomson*, 1 Black. 91; *Gould v. Gould*, 3 Story, 540; *Deane v. Fuller*, 40 Penn. 474; *Jenkins v. Pye*, 12 Peters. 42; *Morris v. Talcot*, 96 N. Y. 100; *Sears v. Shafer*, 1 Barb. 408; 6 N. Y. 268.) The burden of proof in this case is upon the plaintiffs; they allege the fraud, and this burden remains upon them throughout the trial. (*Lamb v. C. & A. R. R. Co.*, 46 N. Y. 271; *Heinneman v. Heard*, 62 id. 448; *People ex rel. Smith v. Pease*, 27 id. 45; 1 Greenl. on Evidence, § 80; *Sullivan v. Warren*, 43 How. 188; *Porter v. Phittleplace*, 1 Wall. 685; *Shultz v. Hoagland*, 85 N. Y. 467; *Brick v. Brick*, 66 id. 144; *Coit v. Patchen*, 77 id. 533; *Marx v. McGlynn*, 88 id. 357; *Estate of Gross*, 7 N. Y. S. Rep. 739.) In this case where the plaintiffs' whole evidence being considered, it appears there is a good defense to the action, the judgment should be reversed and the complaint dismissed. (*Graham v. Meyer*, 99 N. Y. 611; *Marquat v. Marquat*, 12 id. 336; *Emory v. Pease*, 20 id. 62; *Purchase v. Mattison*, 25 id. 211; *Cuff v. Dorland*, 57 id. 560.)

Joshua M. Van Cott for respondents. All the elements that enter into the legal definition of fraud and undue influence co-existed here and were found by the court as facts, to wit, old age, feeble health, a decayed memory, an infirm will, a total dependence upon and confidence in the two sons, and advantage taken by them of the opportunity thus afforded to make all their father's property theirs, in about fifteen months, for a grossly inadequate and unsecured consideration resting in promises. To these may be added the practice of artifice and deception to alienate the grantor's affections from his other children, the fabrication of papers to simulate facts, the false expression of substantial consideration, and the undermining effect of religious delusions. (*In re Will of Smith*, 95 N. Y. 516; 1 Story's Eq. Jur. §§ 236, 238; *Huguenin v. Basely*, 14 Ves. 273; 2 Wh. & Tud. L. Cas. in Eq. [Eng. & Am. Notes] 406; *Whelan v. Whelan*, 3 Cow. 537; *Brice v. Brice*, 5 Barb. 533; *Somes v. Skinner*, 16 Mass. 348; *Taylor v. Taylor*,

8 How. [U. S.] 183; *Marvin v. Marvin*, 4 Keyes, 9; *Sears v. Shafer*, 6 N. Y. 268; *Tyler v. Gardiner*, 35 id. 559; *Rollwagen v. Rollwagen*, 63 id. 504; *Rider v. Miller*, 86 id. 507; *Hardry v. Hardry*, 11 Wheat. 103; *Allore v. Jewell*, 94 U. S. 506; *Griffith v. Godey*, 113 id. 89.)

RUGER, Ch. J. The reversal by the General Term of so much of the judgment of the Special Term as awarded relief to the plaintiffs in respect to the conveyance of personal property, eliminated from the case all questions predicated upon rulings in relation thereto. This determination left the issues in respect to the validity of the conveyances of two parcels of real estate, as the only subjects of controversy on the appeal to this court.

The evidence of the exercise of fraud and undue influence by the defendants, Joseph and John Roworth, in obtaining from their father, William Roworth, deeds of such property, was quite sufficient to sustain the findings of the trial court respecting the same. The evidence tended to show that, for many years prior to January, 1877, William Roworth and his son Samuel carried on the business of manufacturing confectionery at 354 Pearl street in the city of New York, under the firm name of Samuel W. Roworth & Co., and had established a prosperous business. William Roworth was then the owner of a one-half interest in the assets of said firm; of a three-quarters interest in the lot and building in which the business was carried on; of a house and lot in Devoe street, Brooklyn, and another in Fifth street in the same city; a mortgage on property in Detroit for \$2,000, and deposits in bank of about \$500.

In January Samuel W. Roworth died, devising his interest in the assets of said firm equally to the defendants, his two brothers, John and Joseph, and to his two sisters. Between the time of Samuel's death in January, 1877, and March, 1880, the defendants John and Joseph had obtained from William Roworth, without consideration, except a promise to

pay him a small sum weekly from the partnership business, all of the property possessed by him. This was effected by transfers and conveyances of such property, or its proceeds, made successively at different times by William Roworth to one or both of said defendants, between the dates aforesaid. At the time of the death of Samuel, the two defendants were each upwards of forty-five years of age, and had been unsuccessful in the business operations theretofore carried on by them, respectively, and were not then possessed of any property. They were supporting themselves as workmen upon a small salary in the employ of Samuel W. Roworth & Co. In 1877 William Roworth was seventy-six years of age, and had become quite infirm in health; his memory had greatly failed, and he was, practically, incapable of taking an active and responsible part in the management of his business, although he continued for some time thereafter to attend at the store and factory, and make entries in the books, draw up bills and render other small services which he had been theretofore accustomed to perform. He had become very nervous and susceptible, being frequently overcome by emotion and easily affected to tears, and subject to the influence of those surrounding him. He had an aged wife, who survived him, and was dependent upon him for support.

The findings of fact made by the trial court as the basis of its judgment, with respect to the two deeds which remain as the subject of controversy on this appeal, are substantially the same; and that one relating to the transfer of No. 354 Pearl street, New York, reads as follows: That "the said William, Roworth at the time of the execution and acknowledgment of said instrument, did not know or comprehend the legal effect of the said instrument," and that its "execution, acknowledgment and delivery * * * was procured by fraud and undue influence, exercised upon said William Roworth by the said defendants Joseph G. Roworth and John W. Roworth, and by their taking advantage of his age and infirmities, and his confidence and trust in them, and his dependence and reliance upon them; and the signing and

delivery of the same by William Roworth was reckless and improvident, was done without proper advice of counsel and upon a grossly inadequate consideration, and while he was acting under the influence of said defendants unduly exercised upon him." The evidence, as we have said, fully supports this finding, and, indeed, we are of the opinion that the proof would not have justified the contrary conclusion.

In the consideration of this case the court cannot shut its eyes to the significant fact that William Roworth has been substantially stripped of all of his property by some one, and however or to whomever it passed originally, either the property or its proceeds found their way to a common end, viz., to the benefit and possession of the defendants. Whatever the defendants advanced, if anything, towards the acquisition of any part of the property, has been for their own advantage and substantially from funds which they received from their father.

The only material question in this case arises over an alleged inconsistency between the findings made by the trial court, as the basis of its judgment, and a single one also found by the court, out of one hundred and five special requests to find on questions of fact submitted by the defendants at the close of the trial.

It is undoubtedly an established rule of this court where findings of fact, made by the court or referee, which are material to the determination of the case, are irreconcilably conflicting, that we will be governed by that finding which is most favorable to the party appealing; but this rule pre-supposes such a difference in the findings. So far, therefore, as these findings are conflicting, it is the duty of the court to endeavor to reconcile them and give to each some office to perform. It is only when this cannot, by a reasonable construction, be accomplished, that the court are bound to accept that finding most favorable to the appellant. (*Bennett v. Bates*, 94 N. Y. 354; *Redfield v. Redfield*, 110 id. 671.) It was said in the latter case that: "We have held that where the special findings of a judge or referee differ from the findings formally made as

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the basis of the judgment, the appellant has a right to rely upon such findings as are most favorable to him. Those decisions were made at a time when the practice authorized the submission of proposed findings * * * after the decision of the case was rendered; and under that practice such findings were passed upon, generally weeks and frequently months after the formal findings had been made; and we held that where such findings differed from the prior findings and contradicted them, that the appellant had the right to rely upon them if most favorable to him. (*Tompkins v. Lee*, 59 N. Y. 662; *Schwinger v. Raymond*, 83 id. 192; *Bonnell v. Griswold*, 89 id. 122.) Since those decisions the practice has been changed, and now the proposed findings must be presented at the submission of the case, and the presumption is that those findings are passed upon when the case is decided and the formal findings made. Hence, for the purpose of construing the findings, we must look at all of them, both the general and special findings, and if they are in conflict, we must attempt to reconcile them."

In accord with the rule thus stated, we must look at the findings in question to see how far they are inconsistent. The formal finding will be found much broader than the one alleged to be inconsistent therewith, as it especially finds that the deed was fraudulently procured, in ignorance of its effect by the grantor, and these facts are not negatived by any subsequent finding. There is undoubtedly an apparent inconsistency between the additional and some parts of the formal findings, but upon examination we think it does not necessarily nullify the effect of the formal findings. The additional finding is as follows: "That the said Joseph G. and John W. Roworth did not, about said month of April, or at any time, persuade or influence said William Roworth to sign said alleged paper or make any representations in respect thereto." We infer that this finding relates to the deed in question.

In the same connection the court refused to find that the said William Roworth was not "by reason of bodily infirmi-

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ties unable and incapacitated from participating in or taking part in the management and control of his business, property and affairs," or but that "Joseph G. and John W. Roworth were intrusted by William Roworth * * * with the exclusive and entire management and control of his property and business," or that "he was not dependent upon the said Joseph G. and John W. Roworth for the proper management and control of his property and business, and was not solely reliant upon their advice in regard thereto," or that he was cognizant of "the real purpose and effect of his deed to Joseph G. and John W. Roworth." It seems quite evident, by these refusals to find, that the court did not intend, by its informal finding, to nullify the general force and effect of the formal findings. The court had in its original findings, on seven distinct and separate occasions, applying to as many different transfers of property, reiterated, in substance, the findings of fraud and undue influence on the part of these defendants in obtaining such transfers. The several findings were presumptively passed upon at the same time, and it is quite improbable that the court intentionally determined to leave two findings in the case radically inconsistent with each other, or to nullify and contradict its repeated findings, often expressed and confirmed in its previous statement of facts. We are of the opinion that the court by the additional finding intended only that there was no direct or positive evidence of any special influence or persuasion with reference to the procurement of the deed in question, but left the judgment to stand upon the legal presumption of fraud arising upon the facts and circumstances of the case. The informal finding was substantially a finding as to the inferences to be drawn from the evidence, and not upon an existing and independent fact itself, and in that respect was rather a finding upon a question of law than one of fact. In that view it may be said to be erroneous and as not affecting the judgment rendered.

The leading facts of the case have been found and are not impaired by any contradictory finding. They were, substantially, that the deed was secured by parties who had already

obtained the larger portion of the grantor's property without any adequate consideration therefor; that this conveyance left him comparatively destitute of property, and was made without consideration in the absence of any legal adviser, by an aged man, whose mental and physical condition was much enfeebled, and in ignorance of its legal effect, to persons occupying a confidential relation towards him, and who had the management and control of his property and business affairs, and upon whose advice and counsel he was accustomed to rely.

That these facts afford sufficient ground to support a finding of fraud and undue influence, even without positive or direct proof of persuasion or influence, cannot be questioned. They present a situation from which fraud is legally imputable to those benefited, and requiring an explanation from them, which was not furnished by the defendants.

As was said by Judge HAND, in *Cowee v. Cornell* (75 N. Y. 99): "We return, then, to the question whether this case was one of constructive fraud. It may be stated as universally true that fraud vitiates all contracts, but, as a general thing, it is not presumed but must be proved by the party seeking to relieve himself from an obligation on that ground. Whenever, however, the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality, but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from overmastering influence, or on the other from weakness, dependence or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood."

The remarks of Judge ANDREWS, *In the Matter of the Will of Smith* (95 N. Y. 516) are so pertinent to the question that we repeat them here: "Undue influence, which is a species of fraud, when relied upon to annul a transaction, *inter partes*, or a testamentary disposition, must be proved and cannot be

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presumed. But the relation in which the parties to a transaction stand to each other is often a material circumstance, and may, of itself, in some cases, be sufficient to raise a presumption of its existence, * * * and where the situation is shown, then there is cast upon the party claiming the benefit or advantage, the burden of relieving himself from the suspicion thus engendered, and of showing, either by direct proof or by circumstances, that the transaction was free from fraud or undue influence, and that the other party acted without restraint and under no coercion or any pressure, direct or indirect, of the party benefited. This rule does not proceed upon a presumption of the invalidity of the particular transaction without proof. The proof is made, in the first instance, when the relation and the personal intervention of the party claiming the benefit is shown."

The general rule is stated in Story's Equity Jurisprudence (§ 238): "The doctrine, therefore, may be laid down as generally true, that the acts and contracts of persons who are of weak understandings, and who are, therefore, liable to imposition, will be held void in courts of equity, if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented or overcome by cunning or artifice, or undue influence." If, therefore, we should give full effect to the special finding and come to the conclusion that the giving of the deed in question was the voluntary, unrestricted act of the grantor, it would not, under the circumstances of this case, justify the retention by its grantee of the property conveyed, or furnish a reason for refusing relief to the improvident grantor.

We are, therefore, of the opinion that the judgment should be affirmed.

All concur.

Judgment affirmed.

113 473
123 527

AUGUSTA G. GENET, Respondent, v. THE PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY, Appellant.

The Special Term of the Superior Court of the city of New York has power to suspend, by order, the operation of a judgment rendered by it in an equity case, or to relieve the defendant from the duty of immediate obedience pending an appeal to this court, where the appeal does not of itself relieve, and a mere order staying proceedings on the part of plaintiff would not effect that purpose.

(Argued April 16, 1889; decided April 23, 1889.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made January 7, 1889, which reversed, in part, an order of Special Term "on the ground that the court has no power to make the same."

The substance of the Special Term order and the facts, so far as material, are stated in the opinion.

Frank E. Smith for appellant. The order of the General Term is appealable to this court. (*Tilton v. Beecher* 59 N. Y. 176; *E. L. Ins. Co. v. Stevens*, 63 id. 341.) The court below had power to make the order reversed by the General Term. (Code Civ. Pro. §§ 217, 267; Daniel's Ch. Pr. [4th ed.] 1467, 1468; Kerr on Injunctions, 11, 32; 3 Barb. Ch. Pr. [2d ed.] 188; Waterman's Eden on Injunctions [3d ed.] 1214, No. 19; id. 1239, No. 55; 2 Smith's Ch. Pr. [Am. ed.] 68; *S. A. R. R. Co. v. G. E. R. R. Co.* 71 N. Y. 430; *Walford v. Walford*, 19 L. T. [N. S.] 233; *Mayor, etc., v. Wood*, 3 Hare, 131, 151; *Scholey v. C. R. of Venezuela*, 14 Week. Rep. 786; *Roskell v. Whitworth*, 19 id. 804; *Flower v. Lloyd*, 36 L. T. [N. S.] 444; *The St. Lawrence*, 1 Black. 522; *The Lottawanna*, 21 Wall. 558; *Payne v. Hook*, 7 id. 425, 430; *Arrowsmith v. Gleason*, 129 U. S. 86, 99.) The provisions of the Code as to staying execution do not abridge the inherent powers of the court to control its own judgments in the interest of justice. (*Granger v. Craig*, 85 N. Y. 619.)

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The General Term erred in assuming that a judgment cannot be modified except upon appeal. (*Bronson v. Schulten*, 104 U. S. 410, 415; *Freeman on Judgments*, § 90; *Muller v. Ehlers*, 91 U. S. 249; *Brooks v. R. R. Co.*, 102 id. 107; *N. Y. I. Co. v. N. Ins. Co.*, 23 N. Y. 357, 361; *Ladd v. Willett*, 22 Week. Dig. 521.) The power of the court to vacate and set aside a judgment altogether includes power to vacate it for a time by suspending its operation, as the greater includes the less. (*Hatch v. Central Nat. Bank*, 78 N. Y. 487; *Matter of City of Buffalo*, id. 362, 370; *McCall v. McCall*, 54 id. 541.) The existence of such power is necessary to enable the court to do justice. (High on Injunctions, § 1648; *Broom's Legal Maxims*, 139.) The effect of the appeal to this court, of which the court below was bound to take notice from its own records, was to remove the entire cause out of the Superior Court, so that it no longer had jurisdiction to make any order at all in it. (*Draper v. Davis*, 102 U. S. 370; *Keyser v. Farr*, 105 id. 265.)

George C. Genet for respondent. A judge of the New York Superior Court has no jurisdiction or power to reverse, suspend or annul, upon motion of the defeated party, a final judgment rendered by the court on appeal. Upon the further appeal to the Court of Appeals, proceedings upon the judgment may, in certain cases, be stayed, but only as provided by the statute. (*Sixth Ave. R. R. Co. v. Gilbert El. R. Co.*, 71 N. Y. 430, 433; *Dana v. Howe*, 13 id. 306; *Fisher v. Hepburn*, 48 id. 41; *Graves v. Maguire*, 6 Paige, 381.) The order was not authorized by the Code. (Code of Civ. Pro. §§ 1327-1331.)

ANDREWS, J. The judgment in the action, as modified by the General Term, restrained the defendant from using the shaft, breaker and structures erected on the plaintiff's lands in mining coal from lands of the defendant contiguous to the lands of the plaintiff, except under certain limitations specified, and also from depositing on the surface of the plaintiff's land culm from

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coal mined from other lands than those of the plaintiff. The judgment of the General Term, affirming the original judgment as modified, was rendered May 10, 1888. The defendant thereupon appealed from the judgment of affirmance to this court. Subsequently, and on the 25th day of May, 1888, on application made in behalf of the defendant to the Special Term of the Superior Court of the city of New York (the court in which the action was brought), an order was made suspending the operation of the judgment during the pendency of the appeal to this court on condition, among other things, of the execution by the defendant of a bond in the penalty of \$25,000 to pay all damages which the plaintiff might sustain by reason of the defendant continuing to do, pending said appeal, the acts, or any of them, prohibited by the judgment, or by omitting to do any of the acts thereby commanded. The General Term on appeal reversed the order on the ground that the court had no power to suspend the operation of the judgment, or to relieve the defendant from the duty of immediate obedience pending the appeal. This appeal is taken from the order of reversal, and the sole question is whether the Special Term had power to make the order in question.

The powers of the Superior Court in actions of which it has jurisdiction are co-extensive with those of the Supreme Court in like cases. (Code of Civil Pro. § 267.) The Supreme Court possesses the powers and jurisdiction in law and equity formerly possessed and exercised by the Supreme Court of the colony of New York and the Court of Chancery in England prior to July 4, 1876, subject to the limitations created and imposed by the Constitution and laws of this state. (Code of Civil Pro. § 217.) The English Court of Chancery has frequently exercised the power of suspending the execution of its decrees, especially in cases of injunctions pending an appeal. It is a power inherent in the jurisdiction, and its exercise, although discretionary, may in many cases be important in a wise administration of justice, as where there may be doubt as to the correctness of the decision, and great mischief might result to the appellant from

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the execution of the decree pending the appeal in case the decision should be reversed. (*Walford v. Walford*, 19 L. T. [N. S.] 233; *Mayor, etc., v. Wood*, 3 Hare, 131, 151; *Scholey v. Central R. R. of Venezuela*, 14 Week. Rep. 786; *Roskel v. Whitworth*, 19 id. 804; *Flower v. Lloyd*, 36 L. T. [N. S.] 444; *Daniel's Chancery Practice* [4th ed.] 408.)

The judgment in this case prohibits the defendant from using its structures on the plaintiff's lands in the way in which it had been accustomed to use them for several years, and from depositing culm on the surface. It adjudges the right, as claimed by the plaintiff, and denies the adverse claim of the defendant. The judgment operates, of its own force and without further process, as a prohibition against doing the act enjoined. The appeal does not, of itself, relieve the defendant from the duty to obey the judgment. The statute does not prescribe any method by which the execution of a judgment can be stayed in a case like this. (Code Civ. Pro. §§ 1327 *et seq.*) Nor would a mere order staying proceedings by the plaintiff enable the defendant to prosecute its business in violation of the judgment. (*Sixth Ave. R. R. Co. v. Gilbert Elevated R. R. Co.*, 71 N. Y. 430.)

The general practice permits courts to control their judgments in the interest of justice, and unless some statutory rule prescribes the method of procedure, or there is some statutory prohibition, I do not perceive how it can be said that there is no power in the court of original jurisdiction to suspend the operation of a judgment pending an appeal, and especially where, by so doing, the parties would be left in the position in which they were when the action was brought. It will be observed that we are considering the mere question of abstract power, and not whether in a particular case it ought to be exercised, or under what conditions or limitations. If the effect of the order of the Special Term was to reverse, modify, or vary the judgment for error in any point of substance, it would be clearly beyond its jurisdiction. The order does not assume the existence of any such power. It merely suspends the operation of the judgment until the

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appellate court shall pass upon the law. While it may be said that the order, in some sense, interferes with the judgment, by postponing its enforcement, we think this was within the competency of the Special Term in the exercise of its equitable jurisdiction. The incidental operation of the order in this way does not, we think, work any modification in the judgment in the sense which precludes the jurisdiction exercised by the Special Term. (*Granger v. Craig*, 85 N. Y. 619.) There is danger in unduly restricting the power of a court, as in unduly enlarging it. It is quite possible that the General Term, if it had reviewed the discretion of the Special Term, might have reversed the order on the ground that it was improperly exercised. But, upon point of power, we think the conclusion of the General Term was erroneous.

The order of the General Term should, therefore, be reversed, but the case should be remitted to the General Term for the exercise of its discretion.

All concur, except RUGER, Ch. J., and DANFORTH, J., not voting.

Ordered accordingly.

THOMAS M. KING et al., Respondents, v. REON BARNES,
Impleaded, etc., Appellant.

Where a final judgment required a formal transfer of stock upon the books of a corporation by its officers, who were defendants, and where two orders, granted upon the foot of said judgment, each fixed a time and place for such transfer and required it to be made, *held*, that the advising and procuring by B., one of the defendants, disobedience of the judgment on the part of the officers was a civil contempt within the Code of Civil Procedure (§ 14, sub. 4).

Any person who interferes with the process, control or action of the court in a pending litigation, unlawfully and without authority, is guilty of a civil contempt if his act defeats, impairs, impedes or prejudices the rights or remedy of a party to such action or proceeding.

When proceedings against B., to punish him for the contempt, were instituted the stock had not been transferred. Before the final order against him was made the officers had yielded obedience to the judgment and orders,

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thus purging themselves of contempt. B. was sentenced to six months imprisonment. *Held*, no error; that B.'s offense was not an omission to perform something the court had enjoined upon him, and which it was in his power to do, but was an affirmative act of resistance to the process of the court, an active effort to defeat its orders and make its judgment nugatory, and was appropriately punished. (Code Civ. Pro. § 2285.)

While the main distinction between criminal and civil contempts is that one is an offense against public justice, the penalty for which is essentially punitive, and the other is an invasion of private right, the penalty for which is redress or compensation to the suitor, still this distinction is not complete and certain; as behind criminal contempts often stands some trace of private rights, and in civil contempts there are sometimes found the element of punishment merely, as distinguished from the bare enforcement of a remedy.

In the contempt proceedings witnesses were ordered to be examined, who were cross-examined by B., without objection or protest. It was objected on appeal that the court had no power to make such order. *Held*, that B. must be deemed to have assented to the practice adopted.

Reported below, 51 Hun, 550.

(Argued April 16, 1889; decided May 3, 1889.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made February 11, 1889, which affirmed an order of the Special Term declaring the defendant Reon Barnes in contempt and punishing him therefor.

This was a proceeding to punish the defendant Reon Barnes for contempt in advising, directing, aiding and abetting the disobedience by the other defendants, the president and directors of the New York Transit and Terminal Company (Limited), of the judgment and orders of the court.

Barnes did not occupy any official executive position in the company which called upon him personally to perform the acts required. He was adjudged to be in contempt and to be punished by imprisonment for six months in any county in which he might be found and to pay a fine of \$250.

William B. Hornblower for appellant. A proceeding to punish for contempt, begun by an order to show cause, is a special proceeding, and an appeal can be taken from the order adjudging the party in contempt as from a final order in a

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special proceeding, notwithstanding the papers are entitled in the original action. (*Erie R. Co. v. Ramsey*, 45 N. Y. 637.) The appeal brings up any interlocutory order which is properly specified in the notice of appeal just as in the case of an appeal from a final judgment. (Code of Civil Pro. § 1358.) The court had no power to direct imprisonment of the defendant Barnes absolutely for six months, or for any other time, except until the judgment or directions of the court should be carried out in the particulars specified. (Rapahe on Contempts, § 21; *Phillips v. Welch*, 11 Nev. 187, 190.) There was no case made out, within the definitions given by the Code, justifying the order made against Barnes in this case. (*People ex rel. Munsell v. Court of Oyer and Terminer*, 101 N. Y. 245, 251.) A person making application to punish a party for contempt must show that he has some interest in the subject-matter pending in court, or that he has a right to prosecute for the misconduct or other injury complained of. (6 Wait's Pr. 123; *Hawley v. Bennett*, 4 Paige, 163.)

William W. MacFarland for respondents. Aiding and abetting others in the violation and defiance of the orders of the court amounts to a civil contempt, and may be punished as such. (*Mayor, etc. v. Pendleton*, 64 N. Y. 622.) A civil contempt may be punished both by fine and imprisonment, and if the act or duty cannot be performed, the imprisonment may not exceed six months and until the fine is paid. (*People ex rel. v. Court of Oyer and Terminer*, 101 N. Y. 245.) This was a civil contempt and punishable as above stated. (Throop's Code, § 2266, preliminary note.) It was the duty of Barnes to refrain from evil and exert no malign influence over his co-defendants, and for a failure of duty in that respect he has been punished. (101 N. Y. 247.) It was not erroneous to receive oral testimony at the hearing. (*Meyer v. Lent*, 7 Abb. Pr. 225.) There was abundant evidence to convict without the parol evidence given under the order, and, if necessary, that evidence may be disregarded.

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(67 N. Y. 623; Daniell's Ch. Pr. [3d Am. ed.] 739, 740; 3 Greenl. Ev. §§ 381, 385.)

FINCH, J. The defendant Barnes appeals from an order which punishes him by fine and imprisonment for contempt. His offense consisted in advising and procuring the disobedience of the officers of the Staten Island Terminal Company to a final judgment rendered against them and him, which required the formal transfer of stock upon the books of the company, and to two orders granted upon the foot of that judgment, each of which fixed a time and place for such transfer, and required it to be made. The offense charged was certainly not a criminal contempt, and it is now insisted that it was not a civil contempt, because neither described in the specific definitions of section 14 of the Code, nor in the final provision of that section which preserves the common-law right in cases not specifically enumerated. I think the case is covered by the last clause of subdivision 4 of the section referred to. That subdivision specifies, as constituting a contempt, the act of a person who falsely assumes to be an attorney or officer of the court and acts as such; who rescues any person or property in its custody; who prevents any party or witness from attending or testifying in any action or special proceeding; or who is guilty of any other unlawful interference with the proceedings therein. The subdivision specifies certain acts of interference with the due and orderly progress of an action or proceeding to its final and ultimate close, and then adds generally a provision which covers any other interference with it. So that any person who interferes with the process or control or action of the court in a pending litigation, unlawfully and without authority, is guilty of a civil contempt if his act defeats, impairs, impedes or prejudices the right or remedy of a party to such action or proceeding. The action against the officers of the company remained pending through the permission to apply for further relief upon the foot of the judgment until its purposes were fully accomplished. Barnes interfered to prevent obedience to the judgment, and to defy

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the orders of the court. He did this, actively and intentionally, through his control over the officers who were put in position to do his bidding, and were always ready to obey his commands. The evidence warranted a conclusion that he caused and aided their disobedience, paying their fines when payment could not be escaped, and supporting them out of the jurisdiction when the fire of the courts became too hot for safety, or their orders could be thwarted by that means. His conduct, therefore, was a direct interference with the action and its ultimate proceedings in aid of the judgment; and it was an interference which, for a time, defeated, and which, in the end, impeded and impaired the remedy of the plaintiffs, and was planned and intended to effect that precise result. I think it was clearly within the provisions of the Code defining a civil contempt.

It is next argued that the punishment of six months' imprisonment was without authority and exceeded the jurisdiction of the court. When the proceeding against Barnes was begun, the stock had not been transferred and the officers of the company were in contempt. Before the final order against him was made, the officers of the company had grown sufficiently fearful of the possible consequences of their contumacy to yield obedience to the judgment and orders, and by so doing escaped imprisonment. Because they escaped it Barnes thinks that he should. Because he could not keep them longer in contempt he claims to be relieved from the consequences of his own interference. Because they had purged their contempt he thinks it should be taken as purging also his, or, at least, reducing its gravity to the penalty of a mere fine. The argument in his behalf is plausible, but unsound. It is true, as we have elsewhere said, that the main line of distinction between criminal and civil contempts is that the one is an offense against public justice, the penalty for which is essentially punitive, while the other is an invasion of private right, the penalty for which is redress or compensation to the suitor. But we also pointed out that this distinction, while marked and obvious, was not complete and perfect, since

behind criminal contempts often stood some trace of private rights, and in civil contempts was occasionally to be found the element of punishment merely, as distinguished from the bare enforcement of a remedy; and we cited the very provision under which, in this case, Barnes was sentenced to imprisonment as an illustration of the latter peculiarity. (*People ex rel. Munsell v. Court of Oyer and Terminer*, 101 N. Y. 245.) That section of the Code (§ 2285) provides, that "where the misconduct proved consists of an omission of an act or duty which it is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it and paid the fine." This provision manifestly refers to a case in which the court has ordered an individual to perform some act or duty to the performance of which some suitor has a right, and which is essential to his remedy. That was not the situation of Barnes. He was not directed to perform any act or duty at all; and the act commanded was one which he could not perform, because he was not president or treasurer of the company. The provision cited, therefore, can have no reference to him. The section proceeds to enact that "in every other case" the penalty shall be a fine of not more than \$250 and imprisonment not to exceed six months. That is the provision which covered the contempt of Barnes. It was not an omission to perform what the court had enjoined upon him, and which it was in his power to do, but it was an affirmative act of resistance to the process of the court, an active effort to defeat its orders and make its judgment nugatory, "an unlawful interference" with an action or proceedings in the court. As such it was a civil contempt; and as such was visited with the appropriate punishment.

It is further objected that the court had no power in the contempt proceeding to order the examination of witnesses. Whether that be so or not there is no trace of any objection or protest on behalf of Barnes, but, on the contrary, he cross-examined the witnesses and must be held to have assented to the practice adopted. Whether that order is here on a sepa-

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rate appeal or involved in the one under consideration, it must be affirmed as not erroneous under the circumstances.

We are of opinion that the order appealed from was right and should be affirmed, with costs.

All concur.

Order affirmed.

113	482
142	321

113	482
78 AD	594

CHARLES H. BRUSH, Respondent, v. WILLIAM JAY et al.,
Appellants.

In an action to dissolve a law firm, determine its assets and procure a sale of them and a settlement of the partnership affairs, the complaint alleged that certain abstracts of title to real estate in New York and New Jersey were part of the assets. The answer denied the ownership by the firm of said abstracts. An order was made, under objection by defendants, appointing a receiver *pendente lite* and directing him to take possession, among other things, of the abstracts of title in possession of said firm, and, within fifteen days after his qualification, to expose to sale, and sell, the same, although no special or immediate necessity for their sale was shown by the papers. *Held*, error, as by this order the court determined a material issue upon affidavits in anticipation of the trial and the determination of the issues joined, that the abstracts ought to remain in possession of the receiver, free of access to all parties, until the trial and ultimate determination of the rights of the respective parties.

Brush v. Jay (50 Hun, 446) reversed in part.

(Argued April 16, 1889; decided May 3, 1889.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 11, 1888, which affirmed an order of the Special Term appointing a receiver *pendente lite*, etc.

The facts are sufficiently stated in the opinion.

Flamen B. Candler for appellants. The order, in so far as it directs a sale of the abstracts in advance of a trial, and before the ownership of the same is determined, affects a substantial right and is reviewable in this court. (Code of Civ. Pro. § 190.) The abstracts of title are no part of the partnership assets, but are severally the property of the respec-

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tive clients, therefore no receiver can be appointed to take possession of them, and much less to sell them. (*Roberts v. Wyatt*, 2 Taunton, 268; *Langslow v. Cox*, 1 Chitty, 98; *Holm v. Wust*, 11 Abb. Pr. [N. S.] 113.) A receiver should not be appointed to take the abstracts into his possession, or to sell them, as it is not claimed that they are in any way in danger of loss or destruction. (*Goulding v. Bain*, 4 Sandf. 716; *O'Mahoney v. Belmont*, 62 N. Y. 133, 134; *Higgins v. Bailey*, 7 Robt. 613.) It is improper, on a motion for the appointment of a receiver in partnership cases, for the court to undertake to determine what is partnership property. (*Higgins v. Bailey*, 7 Robt. 613.)

Jesse Johnson for respondent. This court will not review the discretion exercised by the Supreme Court. If the papers before the court present a case which, in any view of the facts, would justify the appointment of a receiver, the order will stand. (*Connelly v. Kretz*, 78 N. Y. 620; *Turner v. Crichton*, 53 id. 641; *People v. A. M. L. Ins. Co.*, 74 id. 177; *Woereshoffer v. N. R. C. Co.*, 99 id. 400; *Fellows v. Hermans*, 13 Abb. Pr. [N. S.] 1.) Where it appears that there was a copartnership, that the partnership has been dissolved, that there are copartnership assets, and that the parties do not agree as to the disposition of them, the appointment of a receiver is a matter of course. (*McElvey v. Lewis*, 76 N. Y. 374; *Law v. Ford*, 2 Paige, 310; 1 Collyer on Partnership, § 375; *Jackson v. De Forest*, 14 How. 81; *Llorens v. Costa*, 5 Week. Dig. 484; *Martin v. Van Schaick*, 4 Paige, 479.) Liquidation and sale of assets is a natural result of a dissolution. (*King v. Leighton*, 100 N. Y. 386, 392; *Dandage v. Cole*, 54 Super. Ct. 360; *Innes v. Lansing*, 7 Paige, 586; *McElvey v. Lewis*, 76 N. Y. 371; *Jackson v. DeForest*, 14 How. Pr. 81.) The sale of assets is a natural and proper way of winding up the affairs of a partnership. (*Jackson v. De Forest*, 14 How. Pr. 81; *McElvey v. Lewis*, 76 N. Y. 374; 1 Collyer on Partnership, § 383.) The lease of the offices, with the privilege of the renewal of the same, is an asset, and the plaintiff is

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entitled to his share of the value thereof. (*Mitchell v. Read*, 84 N. Y. 556.) The covenant in the lease against assigning the same does not prevent its being sold, it having become vested in the receiver, by operation of law. (*Roosevelt v. Hopkins*, 33 N. Y. 81; *McAdam on Landlord and Tenant* [2d ed.] 172.)

RUGER, Ch. J. This is an appeal from an order appointing a receiver *pendente lite* of the assets of a law firm, and directing him to take possession, among other things, of all abstracts of title in possession of said firm, and, within fifteen days after his qualification, to expose to sale and sell the same. The action in which said receiver was appointed was brought for the purpose of effecting a dissolution of a partnership; a determination of the assets of the firm, and to procure a sale of the same, and a settlement of partnership affairs. The complaint alleged that the assets of the firm consisted, among other things, of upwards of seventeen hundred abstracts of title to property situated in the states of New York and New Jersey.

The answer denies the ownership by said firm of such abstracts of title, and the title to such abstracts is, therefore, one of the issues to be tried in the action.

In making the order in question we think the court exceeded its authority. It was manifestly improper to determine a material issue upon affidavits in anticipation of the trial, and the determination of the issues joined, according to the mode prescribed by law. We know of no practice which authorizes a court in this manner to defeat the object of the litigation and place the subject of the action beyond the power of the court ultimately to award it to those showing title thereto. That question is yet to be tried and the court has no power to disable itself in advance from rendering such a judgment in the action as will do justice to the parties. If, upon trial, the title to these abstracts should be shown to be in the defendants or in third parties, their premature sale would show a manifest usurpation of authority in ordering it. The authority of the court over such assets of the firm, as are either admitted by the pleadings

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or are judicially determined to be in the firm, is undoubted; but the power to order a sale of all property in the possession of a firm, which, in the usual course of business is frequently the custodian of the property of others, upon the mere fact of such possession, is not, we think, sustainable upon reason or authority, and its exercise is likely to produce manifest and irreparable wrong and injustice.

We do not think the Special Term had authority to take up on motion one of the material issues of the case, and, under objection by one of the parties, make an order, which was practically a final judgment, in respect to the property involved in such issue. No special or immediate necessity for the sale of these abstracts is shown by the papers, and we think it would be for the interest of all parties, as well as a matter of right, that they should remain in the possession of the receiver, free of access to all parties, until the trial and the ultimate determination of the rights of the respective parties therein.

The orders of the General and Special Terms, so far as they direct a sale of the abstracts in the possession of the partnership firm, should be reversed, without costs to either party on this appeal.

All concur.

Ordered accordingly.

CONRAD LOOS et al., Respondents, v. JOHN WILKINSON,
Impleaded, etc., Appellant.

EDWARD P. BATES et al., Respondents, v. SAME, Appellant.

113	485
132	179
113	485
134	524
113	485
135	181

Where conveyances of real estate, made by a judgment-debtor, have been set aside as fraudulent in an action brought by the judgment-creditors and the grantee is called upon to account for the rents and profits, although adjudged to be a guilty participant in the fraud, he is entitled to be allowed on the accounting sums paid by him for taxes, interest on mortgages on the premises accruing while he occupied them, and repairs actually necessary for the preservation of the property and to keep the same tenantable, but he is not entitled to be allowed for insurance premiums paid by him, save so much as has been adopted by and has inured to the benefit of the judgment-creditors.

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Such an accounting must be on equitable principles, and when the fraudulent grantor has been compelled to surrender the property and to account for all the profits, he has, could or ought to have made, the ends of justice have been obtained.

Where, in such a case, it appeared that the grantee paid interest on mortgages long past due, at the rate of seven per cent, as called for by the mortgages. *Held*, he was entitled to be allowed only the legal rate of interest. The property so fraudulently transferred was very large and valuable; it was placed by the grantee in the hands of an agent who managed it and collected the rents. *Held*, that the grantee was entitled to be allowed the agent's commissions.

Wood v. Hunt (38 Barb. 302); *Thompson v. Bickford* (19 Minn. 17); *Allen v. Berry* (50 Mo. 90) and other cases where a fraudulent grantee asks affirmative relief, distinguished.

Strake's Case (1 Bland's Ch. 57) disapproved.

Reported below, 51 Hun, 74.

(Argued April 16, 1889; decided May 3, 1889.)

APPEAL by defendant, John Wilkinson, from order of the General Term of the Supreme Court in the fourth judicial department, made January 19, 1889, the nature of which is hereinafter stated.

This action was commenced by plaintiffs, judgment-creditors of J. Forman Wilkinson and Alfred Wilkinson, to set aside certain conveyances of real estate situate in the city of Syracuse, made by their debtors to John Wilkinson, on the ground that they were executed by the grantors, and taken by the grantee with intent to defraud the creditors of the grantors. The action resulted in a judgment setting aside the conveyances, which judgment, upon appeal to the General Term and to this court, was finally affirmed. (110 N. Y. 195.) John Wilkinson had received the rents of the real estate from December 9, 1884, to July 1, 1886, and by the judgment it was adjudged that he should account for such rents and pay them over to the receivers appointed in this action. It was thereafter referred to a referee to take an account of the rents, and he found that John Wilkinson was chargeable with the amount of rents received, \$42,466.34; that he should be credited with the amount paid by him during the same period for necessary repairs on the premises, \$1,351.78; with the

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amount paid by him for city, county and state taxes on the premises while he occupied them, \$9,257.59; with the interest paid by him on the mortgages upon the premises, which came due while he occupied the same, computing it at six per cent, \$7,973.86; with amount paid by him for insurance, \$2,136.90; making a total credit of \$20,720.13, and leaving due \$21,746.21; upon which sum interest from the 1st day of July, 1886, to the date of his report was charged, amounting to \$1,330.05.

The plaintiffs excepted to the report of the referee so far as it allowed any credits to John Wilkinson as an offset to or deduction from the gross amount of rents received by him. It appeared upon the hearing before the referee that the rents were collected by John Wilkinson, through an agent, who took charge of and managed the property, and he claimed to be allowed for the services of his agent the sum of five per cent upon the gross amount of rents, to wit, \$2,123.31. This claim was disallowed by the referee, and to such disallowance John Wilkinson excepted. It also appeared that he paid upon the mortgages upon the real estate interest at the rate of seven per cent; and he claimed to be allowed the whole sum thus paid. The referee, however, only allowed interest paid upon the mortgages at the rate of six per cent, and John Wilkinson excepted to the disallowance of the one per cent. The report of the referee came on for confirmation at a Special Term and there it was in all things confirmed, except that a credit of \$900 was allowed to John Wilkinson for the services of his agent in collecting the rents of the real estate. Both parties then appealed to the General Term, where the order of the Special Term, so far as it allowed any credits to John Wilkinson, was reversed, and all his credits were disallowed, and thus he was charged with the gross amount of rents received by him, to wit, \$42,666.34.

Louis Marshall for appellant. The term "net rents and profits" means remaining after deducting necessary charges and outlay. (*Owston v. Ogle*, 13 East, 543; *Bennett v. Wor-*

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nack, 3 C. & P. 96; *King v. Tomlinson*, 9 B. & C. 163; *St. John v. Erie R. Co.*, 22 Wall. 137; *Jones Mfg. Co. v. Comm.*, 69 Penn. St. 137; 5 Metc. 598.) Assuming that a fraudulent grantee is accountable for the rents and profits of the real estate conveyed to him in an action by creditors to reach such property and such rents and profits, still, the plaintiffs having come into a court of equity must also do equity, and can, therefore, only obtain the net rents and profits resulting after a deduction of the necessary expenditures made by the grantee. (2 Pomeroy's Eq. Jur. § 910; *Murray v. Gouverneur*, 2 Johns. Cas. 438; *Clute v. Emmerich*, 26 Hun, 10; *Robinson v. Stuart*, 10 N. Y. 189; *Ford v. Knapp*, 102 id. 135; *Harpending v. Munson*, 91 id. 650, 653; *Comstock v. Johnson*, 46 id. 615; *Collumb v. Read*, 24 id. 505, 515; *Coburn v. Morton*, 1 Abb. Ct. App. Dec. 385; *Wakeman v. Grover*, 4 Paige, 23; *Sullivan v. Miller*, 106 N. Y. 635, 643; *Ames v. Blunt*, 5 Paige, 13; *Barney v. Griffin*, 4 Sandf. Ch. 552; *Averill v. Loucks*, 6 Barb., 470; *Matter of Mitchell v. Tennant*, Genl. Term, 4th Dept., July, 1886.) The courts do not hold even a fraudulent grantee responsible for the value of the property transferred to him in fraud of creditors in cases in which it appears that the fraudulent grantee either returned the property to the fraudulent grantor or disposed of it in payment of valid and existing debts of the grantor, or placed incumbrances upon it for that purpose. (*Cramer v. Blood*, 57 Barb. 155; 48 N. Y., 684; *Murphy v. Briggs*, 89 id. 451; Bump on Fraud. Conveyances, 476; 1 Story's Eq. Jur. 434; *Ames v. Blunt*, 5 Paige, 14; *Wakeman v. Grover*, 4 id. 23.) The items paid for taxes and assessments preserved the property from the demands of the city and county, and the defendant has the right to be subrogated to their claims to the extent of such payment. (*King v. Wilcox* 11 Paige, 595; *Clute v. Emmerich*, 26 Hun, 10.) John Wilkinson was entitled to be subrogated to the rights of the mortgagees for the payments made by him upon the mortgages, and upon equitable principles is entitled to an allowance therefor. (*Robinson v. Stuart*, 10 N. Y. 190; *Clute v.*

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Emmerich, 26 Hun, 10.) He is also entitled to an allowance for the moneys expended by him for repairs made by him upon the property. (*Jackson v. Ludeling*, 99 U. S. 513; *King v. Wilcox*, 11 Paige, 595; *Clute v. Emmerich*, 26 Hun, 10; *Holmes v. Davis*, 19 N. Y. 489.) He is also entitled to credit for the expenses incurred in collecting the rents and profits. (*The Tremolo Patent*, 23 Wall. 518; *Strong v. Skinner*, 4 Barb. 560.) The expenses of insurance also constitute an item which should be allowed. (*Murtha v. Curley*, 90 N. Y. 372; *Van Schaick v. N. F. Ins. Co.*, 68 id. 434.)

Frank Hiscock for respondents. One who has received the rents and profits of land, not being entitled to them, as against a judgment-creditor, having an equitable right to the property for the satisfaction of his debt, and to the rents and profits, that they may be so applied is chargeable in accounting for the rents and profits, with interest. (*Cowing v. Howard*, 46 Barb. 579; *Taylor v. Taylor*, 43 N. Y. 584; *Jackson v. Wood*, 24 Wend. 443.) A deed fraudulent in fact will be declared absolutely void and not permitted to stand as security for any reimbursement or indemnity. (*Boyd v. Dunlap*, 1 Johns. Ch. 478-482; *Briggs v. Merrill*, 58 Barb. 389; *Stoville v. F. and M. Bk.*, 16 Miss. 316; *Sands v. Codwise*, 4 Johns. 598, 599; Wait on Fraud. Con. 264; Bump on Fraud. Con. 613, 614; *Railroad Co. v. Soutter*, 13 Wall. 523; *Bean v. Smith*, 2 Mason, 296-298; *Wood v. Hunt*, 38 Barb. 302, 309; *Boland v. Walker*, 7 Ala. 280; Kerr on Fraud and Mistake, 200; *Union Bk. v. Walker*, 12 Hun, 308.) The fraudulent vendee is not entitled to be credited on this accounting with the amount paid for interest upon the mortgages on the Globe Hotel property. (Bump. on Fraud. Con. [3d ed.] 614; *In re Mead*, 19 Bankruptcy Reg. 81; *Thompson v. Bickford*, 19 Minn. 18; *Boyd v. Dunlop*, 1 Johns. Ch. 478; *Van Wyck v. Baker*, 16 Hun, 168; *Davis v. Leopold*, 87 N. Y. 620-622; *Lore v. Dickes*, 16 Abb. N. C. 47-52; *Seivers v. Dickover*, 111 Ind. 497; *Bennett v. Bates*, 94 N. Y. 373.) So far as

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the plaintiffs are concerned, the payment of the taxes, as well as the interest, was voluntary, and payments voluntarily made cannot be recovered. (*Seaton v. Pepper*, 28 Hun, 31; *N. Y. & H. R. R. Co. v. Marsh*, 12 N. Y. 308; *Mayer v. Mayor, etc.*, 63 id. 455.) The plaintiffs could not possibly have benefited by the insurance, and, therefore, will not be charged with the burden of it. (Bump on Fraud. Con. 610; *Le Row v. Wilmarth*, 91 Mass. 382; *Bernheimer v. Beer*, 56 Miss. 149; *Carpenter v. P. W. Ins. Co.*, 16 Pet. 495; *Nipper's Appeal*, 75 Penn. 478.) If another person has an interest in the property he may insure for himself; nor can he set up a claim to money which has become due to another, unless that other be his debtor, and the money is garnished or attached. (*Carpenter v. P. W. Ins. Co.*, 16 Pet. 495; *Nipper's Appeal*, 75 Penn. St 478, 479.)

EARL, J. Upon the trial of this action it was adjudged that the deed from J. Forman and Alfred Wilkinson to John Wilkinson was executed and delivered by them and received by him with intent on the part of each of them to hinder, delay, cheat and defraud the plaintiffs and other creditors of the grantors, and that it was, therefore, fraudulent and void and should be set aside. It was held at the General Term, by the decision now under review, that, because the grantee, John Wilkinson, was an active and guilty participant in the fraud, he was entitled to no deduction from the gross amount of rents received by him on account of money paid by him either for taxes, interest, repairs, insurance or the expenses of collecting the rents. This conclusion was reached by the application of the general rule that a fraudulent grantee thus situated is entitled to no protection, aid or assistance from a court of equity. A general statement of the rule is found in *Sands v. Codwise* (4 Johns. 537), in the language of Chief Justice KENT, as follows: "A fraudulent conveyance is no conveyance as against the interest intended to be defrauded. This is the plain language and intelligent sense of the rule of the common law. It is impossible that these deeds can be permitted to

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stand as a security if they are to be adjudged void *ab initio*. If they have no lawful existence, it would be inconsistent and absurd to recognize them for any lawful purpose. I presume there is no instance to be met with of any reimbursement or indemnity afforded by a court of chancery to a *particeps criminis* in a case of positive fraud. In *Smith v. Loader* (Prec. in Chan. 80), the party advancing money to an agent under a combination with him to cheat the principal, lost his whole security from the principal for the money actually advanced to his agent. It is fit and proper that this result should take place, as a contrary course might afford countenance to fraud by giving it a partial effect. It would not become a court of equity to take a single step to save harmless a party detected in a fraudulent combination to cheat." In *Boyd v. Dunlap* (1 Johns. Ch. 479) the same learned jurist said: "A deed fraudulent in fact is absolutely void, and is not permitted to stand as security for any purpose of reimbursement or indemnity." In *Lobstein v. Lehn* (120 Ill. 549) it was held that a deed, fraudulent in fact, is absolutely void as against creditors of the grantor, and will not be permitted to stand as a security for any purpose of reimbursement or indemnity, but that it is otherwise with a deed which is only constructively fraudulent; that, in the latter case, the grantee may hold the same as a security for a debt honestly due him.

The following cases are particularly relied upon to sustain the conclusion of the General Term: *Bean v. Smith* (2 Mason, 252); *Railroad Co. v. Soutter* (13 Wall. 517); *Borland v. Walker* (7 Ala. 269); *Thompson v. Bickford* (19 Minn. 17); *Allen v. Berry* (50 Mo. 90); *Seivers v. Dickover* (101 Ind. 495); *Stovall v. Farmers and Merchants' Bank* (16 Miss. 305); *Kenney v. Brown* (3 Ridg. P. C. 462); *Backhouse's Administrator v. Jett* (1 Brock. 500); *Blow v. Maynard* — *Larrence v. Blow* (2 Leigh [Va.] 29); *Peters v. Smith* (4 Rich. Eq. [S. C.] 197); *Mosely v. Miller* (13 Bush, 408); *Van Horn v. Fonda* (5 Johns. Ch. 385); *King v. Wilcox* (11 Paige, 589); *Lore v. Dierkes* (16 Abb. N. C. 47); *Union National*

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Bank v. Warner (12 Hun, 306); *Wood v. Hunt* (38 Barb. 302); *Davis v. Leopold* (87 N. Y. 620).

We have carefully examined these authorities and they furnish very little, if any, countenance for the contention of the plaintiffs. They are all cases where the fraudulent grantee was asking for the active interference of some court for his protection, or for his reimbursement for improvements, for moneys paid in pursuance of the fraudulent arrangement with his grantor, or to discharge incumbrances, or to secure to him the payment of a debt due to him from the fraudulent grantor, or where he was compelled to account for profits which he had actually made, or could have made, out of the property fraudulently conveyed; and the equitable rule was enforced that "he who hath committed iniquity shall not have equity," which is merely another way for saying "that one who comes into a court of equity, seeking its aid, must come with clean hands." But in none of them was the question really involved or discussed, with which we are now dealing, with the possible exception of three cases, to which we now call attention.

In *Wood v. Hunt* evidence was given that the fraudulent grantee of land, subsequently to the grant, paid certain debts of the grantor and purchased certain obligations against him, and it was held that the grantee, by such evidence alone, did not present a case which entitled him to demand, as a condition to the granting of relief to the creditors of the grantor by adjudging the grant void and directing a sale of the premises, and the satisfaction of a judgment-creditor from the proceeds of the sale, that any provision should be made for his indemnity for sums which he had thus voluntarily paid. The complicity of the grantee in the fraud of the grantor deprived him of any right to relief, in respect to such payments, from a court of equity. In that case the fraudulent grantee was seeking the protection of the court for payments to creditors of the grantor, and to the grantor himself. It is true that, in a certain contingency, he was ordered to account for rents and profits. But there was no adjudication as to the principles upon which such an accounting should be had, and

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no holding that, upon such an accounting, a fraudulent grantee should be bound to account for the gross rents and profits received without any allowance for taxes or repairs.

In *Thompson v. Bickford* the court said: "In equity a conveyance set aside as constructively fraudulent is upheld in favor of one not guilty of actual fraud to the extent of the actual consideration, and is vacated only as to the excess. But if there be actual fraud, there is no difference between law and equity. The conveyance is considered as void *ab initio*, and set aside entirely and cannot stand as security to the fraudulent grantee. It is the same thing as if no deed had ever been executed." In the head note it is stated that the rents and profits and the proceeds of the parcel of land sold were liable to the same extent as the land, and that the grantee was accountable for them to the grantor's creditors, without deduction for his demands, or for the money paid for taxes, or to extinguish liens or incumbrances placed thereon by the grantor. The facts as to the payment of the taxes do not appear. There is no discussion as to them in the opinion, and it does not appear clearly from the opinion that the court held that the fraudulent grantee could not have a deduction from the rents on account of taxes paid by him. So far as it was held that the fraudulent grantee could not claim reimbursement for the liens or incumbrances paid, or that he could not have satisfaction of the indebtedness from the fraudulent grantor to him, it was simply an enforcement of the general rule in harmony with all the other cases. The main contention there was as to the indebtedness of the fraudulent grantor to the fraudulent grantee; and it does not appear that the fraudulent grantee was required to account for the gross rents.

In *Allen v. Berry* it was held that where a creditor purchases the lands of his debtor at a sale under execution, and brings suit against the debtor and a third party to set aside, as fraudulent, a conveyance of the land from the former to the latter, no principle of equity will permit the fraudulent grantee to offset, against the value of the property the amount he may have paid for it; that fraud renders the deed absolutely

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void as to creditors, and the plaintiff is entitled to recover the property and its rents, etc., as though no such fraudulent deed ever had been made. In that case Jones, the fraudulent grantee, put improvements upon the house fraudulently conveyed to him to the amount of about \$1,200 and he occupied it himself, and it was proven that the rents and profits were worth \$100 per annum, and he was ordered to pay the plaintiff \$400 for four years rent. It does not appear that the improvements made upon the house were necessary for its preservation or to make it suitable for occupation. The costs of the improvements were not actually disallowed. The property was sold under a mortgage foreclosure and there was a surplus of \$1,700 which came into the hands of Jones, and this statement is contained in the opinion: "The decree does not refer to the improvements by Jones on the Hamilton house, nor does it charge him with the overplus money he received at the sale under the county mortgage, which, with other moneys collected by him, was more than the amount of the alleged improvements." It, therefore, appears in that case that the fraudulent grantee was allowed to retain more money than the amount of the improvements made by him upon the house. These cases, therefore, have little or no bearing upon the present discussion.

The only authority we have been able to find squarely upholding the plaintiff's contention is *Strake's Case* (1 Bland's Ch. R. 57). In that case Strike was the fraudulent grantee of property subject to a ground rent, and he was compelled to account for the full value of the rents and profits of the property, rejecting entirely his claim for his advances in payment of taxes, ground rent and an assessment for a street extension. While the rule as to the responsibility of fraudulent grantees was there very accurately stated and properly applied by the chancellor of Maryland, so far, however, as it was decided that the fraudulent grantee should be made to account for rents and profits without any allowance for taxes, assessments and ground rents paid by him, it is, we believe unsupported by any

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authority, and stands without a fellow in this country or in England.

There is not a hint in any authority in this state sustaining the contention of the plaintiffs. But here and elsewhere there are some authorities which sustain the claim of the appellant as to some of the items at least which were disallowed at the General Term. In *Bump on Fraudulent Conveyances* (575), it is said: "When the transfer is tainted with actual fraud, no allowance can be made for improvements. It would seem, however, to be just and reasonable to allow expenditures as an offset to rents and profits, especially when they have been made to pay taxes." In *Jackson v. Ludeling* (99 U. S. 513) the case arose under the civil law as administered in Louisiana, and cannot, therefore, be an authority in this case. But Mr. Justice BRADLEY, delivering the opinion in that case, said: "But as the vice of their title consisted in their own inequitable acts and proceedings, we think that they are to be regarded, in the language of the civil law, as possessors in bad faith. The common law allows nothing to the possessor in good or bad faith for expenditures made upon land from which he is evicted by superior title; but equity, in cases within its jurisdiction, allows the possessor in good faith for repairs and improvements, but where the possessor (being a trustee) has been guilty of actual fraud, it makes him no allowance for improvements, but allows him compensation for necessary repairs." In *Sands v. Codwise*, while the general rule as to the situation and responsibilities of fraudulent grantees is accurately and fully stated by Chief Justice KENT, and the fraudulent grantees there were ordered to account for the rents and profits of the lands conveyed to them, it was ordered (p. 605) that, in taking such accounts, allowances should be made for taxes, repairs and improvements permanently useful, and that only the balance of the rents and profits should be paid to the assignee of the estate of the fraudulent grantor; and that case seems to be a precise authority for the allowance in this case of the sums paid by John Wilkinson for taxes and repairs.

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In *Van Horn v. Fonda*, the defendant was held to be a fraudulent purchaser of what was called the Caughnawaga farm, and it was decreed that he should convey the same to the plaintiffs free from all incumbrances. The learned counsel for the plaintiffs, Mr. Henry, admitted that while the defendant should be charged with the rents and profits of the farm he should be credited with actual expenditures for repairs. Chancellor KENT held that the defendant ought to be charged with the rents and profits, and credited "with expenditures for actual repairs." He said further: "Nor do I think that the defendant ought to be allowed, under the circumstances of this case, for what might otherwise be deemed beneficial improvements made by him on the Caughnawaga farm. He entered in his own wrong, and held under a claim of title procured by fraud, and he is not entitled beyond the amount of his actual expenditures. Everything beyond that was gratuitous. A fraudulent possessor is never allowed for beneficial improvements."

In *King v. Wilcox* (11 Paige Ch. 589), the owner of a lot, with a house thereon, which was subject to two mortgages, conveyed it absolutely to his brother-in-law for the purpose of defrauding his creditors, and the grantee subsequently went into possession and received the rents and profits and made some improvements thereon, and subsequently paid and took an assignment of the mortgages, and it was held that a subsequent creditor of the fraudulent grantor had a right to file a bill to set aside the fraudulent conveyance, and to have the proceeds of the property applied to the payment of his debt, after paying the amount due upon the mortgages, and the value of the improvements made by the fraudulent grantee upon the premises. It was also held that in taking an account of the rents and profits of the premises received by the fraudulent grantee, to be offset against the amount due to him upon the mortgages, he should not be charged with that part of the rents and profits which had arisen exclusively from his own improvements. The chancellor said: "So far as respects

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the mortgages held by the fraudulent grantee, the rents and profits are, unquestionably, an equitable offset, after deducting for taxes and assessments, except such part of the rents and profits as have arisen exclusively from improvements made by Sawyer, the fraudulent grantee." It is true that there the fraudulent grantee, after he had taken an assignment of the mortgages, was, in some sense, a mortgagee in possession. Yet he had taken the conveyance and gone into possession for the purpose of defrauding the creditors of the grantor, and it is not perceived how, while he was thus in possession, he could better his condition by taking an assignment of valid mortgages for the purpose of still further effectually carrying out the fraudulent scheme. He was still a fraudulent grantee in possession and bound to account for the rents and profits upon the same principles which would be applicable to any other fraudulent grantee; and yet it was held that he was entitled to deductions on account of taxes, assessments and improvements.

A further reference to the authorities is not needful. We think the weight of authority is where we might expect to find it, in favor of the allowance of, at least, some of the claims of John Wilkinson which were disallowed at the General Term. It is the general rule, even in actions to recover damages for pure torts, that the plaintiff shall recover compensation for such damages only as he has actually suffered; and such is the invariable rule in all cases except where, by the settled rules of law, punitive damages may be awarded, and in such cases courts are constantly striving to come nearer to the rule of compensation, leaving the wrong-doer to the criminal courts for punishment. In actions of ejectment, even against persons occupying land without a shadow of right, the plaintiff can recover as mesne profits only the rental value as in an action for use and occupation, and such value is not based upon gross rents, but upon net rents after allowance for necessary repairs, taxes and other fixed charges. (*Murray v. Gouverneur*, 2 Johns. Cas. 438; *Holmes v. Davis*, 19 N. Y. 488.)

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The wrongful infringer of a patent is not required to pay to the patentee the gross profits he has made, but only the net profits. (*The Tremolo Patent*, 23 Wall. 518; *Burdell v. Denig*, 2 Otto, 716).

It is true that a fraudulent grant to a grantee who is a guilty participant in the fraud, must as to the creditors of the grantor be treated as void *ab initio*. But the only way the creditors can reach the rents and profits received by the grantee is by an accounting in equity. And what does such an accounting mean? Does it mean that he shall pay for more rent than he has received or could have received, for more profits than he has made or could have made? Shall he account to the creditors for more rents than they could have received if they had had possession of the real estate? If the grant be of a waste piece of land which the grantee has improved so as to make rent possible, shall he account for gross rents without any allowance for his improvements? If the fraudulent conveyance be of a vessel, unseaworthy, and the vendee makes her, by repairs, seaworthy, and then charters her, shall he be required to account for the gross charter-money? Or, in the cases above cited, where the fraudulent vendee of slaves was compelled to account for their hire, would an allowance for their maintenance while they were working for hire have been denied? To answer these queries in the affirmative would, even in a court of equity, be a wide departure from the rule of compensation. It would be spoliation, not justice or equity. A court of equity does not sit for the punishment of criminals. If a fraudulent grantee has violated the criminal law, he may be prosecuted and punished in the criminal courts. While such a grantee will not be allowed for permanent improvements made upon the granted property to suit his fancy or simply to promote his supposed interests, when the creditors of the grantor come into a court of equity seeking to compel him to account for rents and profits, the accounting must be upon equitable principles; and when he has been compelled to surrender the property conveyed to him, and to account for all the

profits he has made, or could have made, or ought to have made therefrom, the ends of justice have been completely and exactly attained.

Now, looking first at the taxes paid by John Wilkinson, they were imposed by supreme authority for the benefit of the public and were inevitable. If the creditors had taken the property at the time John Wilkinson took it, they would have been obliged to pay them. By the payment he did them no wrong and caused them no prejudice. Why should he not be allowed them? Upon what principle of equity or upon what ground of reason or public policy or justice can he be compelled to allow for the gross rents without any deduction whatever for the taxes which he was obliged to pay?

In reference to the repairs it was found that "they were necessary for the preservation of the property and to keep the same tenantable." The expenses for them were not made in pursuance of or to carry out the fraudulent scheme or to gratify the caprice of John Wilkinson; but they were necessary to preserve this very property for the creditors, and to make the rents for which he is accountable. Why, then, should he not be allowed for such expenses? No harm or prejudice is caused the creditors by such allowance. The repairs, as it turned out, were really made for their benefit.

As to the interest upon the mortgages, there was no dispute that the mortgages were valid liens upon the property; the interest had to be paid. If the creditors had taken the property, they would have been obliged to pay it. The payment was one made for their benefit and in their interest. It had no connection whatever with the fraudulent scheme, and it is impossible to perceive upon what principles of justice or equity an allowance for such a payment could be refused.

The case would be different if John Wilkinson were so situated that he was obliged to come into a court of equity and ask for affirmative relief that these claims be enforced against the property or paid out of it. Then the court might leave him entangled in the toil which he himself had woven—the victim of his own fraudulent acts. But he asks nothing. He is on the

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defensive. He is bound to account for the rents, but claims that these sums have been expended out of them and that he has only the balance for which he is accountable. The court could have compelled him to account either for the rental value of the property or for the rents actually received; and if he had been compelled to account for the rental value, it would have been that value, with the interest, taxes and repairs considered upon the question of the value; and the plaintiffs should not be in a better position when, instead of taking the rental value, which is really all they have lost, they take what he has actually received for rents, which must mean what he has received after the necessary deductions.

We are not quite so clear that an allowance ought to be made for the expense of collecting the rents. If John Wilkinson had done the work of collecting the rents personally, no allowance for that work could be made. But the property, from which the rents came, was very large and valuable, and it was placed by him in the hands of an agent who managed it and collected the rents, and we think that an allowance for commissions, which is an ordinary allowance in such cases, is proper. The rents came to him reduced by the amount of this charge, and in estimating the rental value of real estate, a charge of this kind would generally be considered.

But the claim for insurance rests upon different principles. That, in no way, as it turned out, benefited any one. It was not an insurance for the benefit of the creditors, but solely for the benefit of John Wilkinson; and if the property had burned down, they could not have enforced it in their favor. In that event no one could have collected the insurance excepting John Wilkinson, and he might have failed; and even if he had succeeded in getting the insurance money, it is not certain that these creditors would have been entitled to it or able to reach it. (*Nipps' Appeal*, 75 Pa., 472; *Carpenter v. Providence and Washington Ins. Co.*, 16 Peters, 495; *Leroy v. Wilmott*, 9 Allen, 382.)

The finding of the referee in reference to the insurance is as follows: "That between the 9th day of December, 1884,

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and the 1st day of June, 1886, Mr. Chamberlain also paid for insurance upon the Globe Hotel property and the residences of J. Forman and Alfred Wilkinson, conveyed to John Wilkinson, the sum of \$2,136.91; that, by the terms of a portion of said policies, the loss, if any, which would occur, was first made payable to J. Forman and Alfred Wilkinson as executors of the last will and testament of John Wilkinson, the interest so sought to be protected being the mortgaged interests above described; that prior to the expiration of a portion of said policies, to wit, on the 7th day of October, 1886, with the consent of the insurers, a provision was inserted in the respective policies then in force providing that said policies insured John Wilkinson, J. Forman Wilkinson and the estate of Alfred Wilkinson, Charles E. Hubbell and Albert K. Hiscock, as receivers under certain judgments of J. Forman and Alfred Wilkinson, and Charles E. Hubbell, as assignee of said Wilkinsons, as their respective interests may be determined; that the premiums on all of said policies were paid by Mr. Chamberlain." It is impossible to perceive how any allowance could be made to John Wilkinson for the expense of insurance procured for the benefit of the mortgagees. But it appears that on the 7th day of October, 1886, by consent of the insurers, a provision was inserted in the policies, then in force, providing that they should insure John Wilkinson, J. Forman Wilkinson, and the estate of Alfred Wilkinson, Charles E. Hubbell and Albert K. Hiscock, as receivers appointed in this action; and so far as the receivers themselves adopted the insurance, and thus secured its protection, it is proper that they should bear the expense thereof. But how much of the expense they should equitably bear was not shown, and cannot be ascertained from this record. It is possible that some apportionment of the expense of insurance ought to be made and can be made, and if that be so, a further reference may be ordered, in the discretion of the Supreme Court, to ascertain the amount; but no allowance can now be made for it.

It is claimed, on behalf of John Wilkinson, that he should

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have been allowed his full claim for commissions paid his agent for collecting the rents, as found by the referee, to wit, \$2,123.31, and that the Special Term erred in allowing him only \$900 for that item. All the evidence was before the judge at the Special Term, and we cannot say that he erred in his estimate of the value of the services and the amount to be allowed as compensation therefor.

John Wilkinson actually paid upon the mortgages, which were liens upon the property, interest at the rate of seven per cent; but the referee and the Special Term credited him with interest at the rate of six per cent only. In this, we think, there was no error. The mortgages had been long past due, and six per cent only could be demanded by the mortgagees. He could not claim credit for an over-payment. So far as the one per cent is concerned the creditors derived no benefit whatever therefrom. (*Bennett v. Bates*, 94 N. Y. 373.)

Our conclusion, therefore, is that the order of the General Term should be reversed and the order of the Special Term modified by striking out the credit of \$2,136.90 for insurance; and as thus modified it should be affirmed, without costs to either party, upon appeal to the General Term and to this court.

RUGER, Ch. J., ANDREWS and PECKHAM, JJ., concur; DANFORTH, FINCH and GRAY, JJ., concur as to all except the item of \$900 for expenses of collecting rent.

Judgment accordingly.

Statement of case.

In the Matter of the Judicial Settlement of the Account of
CAROLINE E. CROSSMAN et al., as Executors of the Last
Will and Testament of HENRY CROSSMAN, Deceased.

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The will of C. directed that \$100,000 should be invested and the income thereof paid to his wife during her life; upon her death the principal to be paid to H., the testator's adopted son, if he shall then have arrived at the age of twenty-eight years; if not, it was to be kept invested and the income applied to his use until he arrived at the age of twenty-eight, and then the principal, with any accumulations of income, to be paid to him. In case of his death before arriving at that age, without leaving lawful issue, the will directed that said principal should be divided among certain beneficiaries named; if he left lawful issue, then said sum was directed to be paid to such issue. The residuary clause of the will provided as follows: "All the rest, residue and remainder of my estate, real and personal, wheresoever and whatsoever, and such as I shall hereafter acquire, I do give, devise and bequeath to my adopted son, * * * to be paid over to him when he shall have arrived at the age of twenty-eight years." Following this were provisions disposing of the residuum in case of the death of H. before reaching the age of twenty-eight. C. died, leaving his widow and H. surviving him. H. died after reaching the age of twenty-eight; the widow survived him. On an application of the executors of C. for a settlement of their accounts, certain of the latter's next of kin appeared and filed objections thereto, which were overruled on the ground that they were not interested in the estate. *Held*, no error; that H. took a vested interest in remainder in the \$100,000, if not by virtue of the clause setting it apart, at least under the residuary clause.

The will contained no direction as to the disposition of the income of the residuary estate until H. reached the age of twenty-eight. *Held*, that, under the Revised Statutes (1 R. S. 726, § 40), the rents and profits of the real estate were payable as they accrued to H., he being presumptively entitled to the next eventual estate, and so far as the residuary estate was personal, its income belonged to H. as the owner of the *corpus* thereof, and was payable to him as it accrued.

(Argued April 17, 1889; decided May 8, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 14, 1888, which affirmed a final decree of the Surrogate's Court of Kings county.

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Henry Crossman died January 7, 1881, leaving a last will and testament, the third and seventh clauses of which are as follows :

“Third. I desire to make ample provision for the support and maintenance of my said wife, and, in addition to what I have above given, I order and direct that my executors, before paying the legacies hereinafter mentioned, do set apart of my estate the sum of one hundred thousand dollars, and keep the same invested and out at interest, and that they apply the interest or income therefrom to the use of my said wife in half-yearly payments, or oftener if convenient, during the term of her natural life, and that from and after her death they pay over the said sum of one hundred thousand dollars to our adopted son, Henry C. Crossman, if he shall then have arrived at the age of twenty-eight years; but if, at the decease of my wife, he shall not have arrived at the age of twenty-eight years, then my executors are directed to keep the same invested until he shall have arrived at that age, and that they apply the interest or income to his use, and on his arrival at the age of twenty-eight years the said principal and the accumulated interest (if any) is to be paid to him; but if my said adopted son shall die before he arrives at the age of twenty-eight years, and not leaving lawful issue him surviving, then the said sum of one hundred thousand dollars shall be divided as follows, and I do give and bequeath the same accordingly: One thousand dollars to the Orphan Asylum, formerly in Cumberland street, in the city of Brooklyn; one thousand dollars thereof to the Brooklyn Hospital, and the balance to be equally divided among the children and grandchildren of the following named persons, viz.: The children and grandchildren of my brother, James Crossman, and of my sister, Susan Barnet, except her son, Charles Barnet; and should any of the said children die before me, leaving lawful issue him or her surviving, I direct the share which the one so dying would have been entitled to, if living, shall be paid to such issue; but if my said adopted son shall die under the age of twenty-eight years, and leaving lawful issue him sur-

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living, then the said sum of one hundred thousand dollars is to be paid over to such issue, and I do bequeath the same accordingly.

"*Seventh.* All the rest, residue and remainder of my estate, real and personal, wheresoever and whatsoever, and such as I shall hereafter acquire, I do give, devise and bequeath unto my adopted son Henry C. Crossman, to be paid over to him when he shall have arrived at the age of twenty-eight years; if my said adopted son shall depart this life without having attained the age of twenty-eight years, and leaving lawful issue him surviving, then my said residuary estate shall be paid over to his issue, but if he shall die under that age and without leaving lawful issue him surviving, then the whole income of my said residuary estate shall be applied to the use of my wife for and during her natural life, and upon her decease the principal is to be divided among my next of kin and heirs-at-law as if I had died intestate. I do hereby nominate, constitute and appoint my said wife, Caroline E. Crossman, executrix, and my friend, Samuel Burhans, of the city of New York, and my said son, Henry C. Crossman, executors of this my last will and testament and trustees under the same, and I do hereby authorize and empower them, and the survivor of them, and such one or more of them as shall act for the time being, to sell and dispose of any and all my real estate not herein specifically devised and to convey the same to the purchaser or purchasers thereof. It is my earnest desire that my friend, Samuel Burhans, will serve as my acting executor and trustee. The provision herein made for my said wife, Caroline E. Crossman, is to be taken and accepted by her in lieu and bar of dower and all other claim on my estate."

Later in the same month the will was admitted to probate and letters testamentary thereon were issued by the surrogate of Kings county to Caroline E. Crossman, Henry C. Crossman and Samuel Burhans, the executors named therein. The testator left no issue; Henry C. Crossman became twenty-eight

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years of age on the 15th day of October, 1885, and died on the 13th day of May 1886, leaving Caroline E. Crossman, the widow of the testator, surviving him. He left a last will and testament in which he disposed of all his property, real and personal, to Caroline E. Crossman and Samuel Burhans. After his death Caroline E. Crossman and Samuel Burhans, the surviving executors of the will of Henry Crossman, made application to the surrogate for the judicial settlement of their accounts as executors, and in pursuance of that application their accounts were presented to the surrogate and came on for settlement, and certain of the next of kin of the testator appeared and contested the same, and filed objections thereto. Their objections were all overruled on the ground that they were not interested in the estate of the testator. The decree of the surrogate, upon the final settlement of the accounts, was affirmed at the General Term, and then certain of the next of kin of the testator appealed to this court.

Eugene Smith for W. H. Crossman et al., appellants. Where there is no express gift to the remainderman, the only gift being in the direction to pay at a future time, the gift does not vest in the remainderman until the time for its payment arrives. In such case the interest of the remainderman is contingent prior to the time of payment, and if he dies before the time of payment, the gift fails as to him. (*Smith v. Edwards*, 88 N. Y. 92; *Colton v. Fox*, 67 id. 348; *Hobson v. Hale*, 95 id. 588, 613-616; *Shipman v. Rollins*, 98 id. 311; *Delafeld v. Shipman*, 103 id. 463.) The language of the will conclusively indicates a future, and not a present, disposition of the principal of the fund. (*Shipman v. Rollins*, 98 N. Y. 324; *Hobson v. Hale*, 95 id. 613; *Livingstone v. Greene*, 52 id. 118; *Acker v. Gordon*, 67 id. 63.) In the interpretation of a residuary clause in a will, or one which it is claimed bears any analogy to it, the court will not only look at the language employed, but the surrounding circumstances, to determine what the intention of the testator was. (*Kerr v. Dougherty*, 79 N. Y. 348.) The principal of

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the trust fund of \$100,000, subject to the life interest of Mrs. Crossman, goes to the next of kin of the testator, and not to the estate of Henry C. Crossman, the residuary legatee. (*Adair v. Brimmer*, 74 N. Y. 539; *King v. Talbot*, 40 id. 76; *Goodwin v. Howe*, 62 How. Pr. 134.) The income from the residuary estate, intermediate the testator's death and 15th October, 1885, when Henry C. Crossman became twenty-eight years old, goes to the next of kin. (*Hobson v. Hale*, 95 N. Y. 588.)

James A. Hudson for Jane F. Macarthy, appellant. The appellant, with others, is entitled, as heirs-at-law and next of kin of the deceased, to the \$93,897.35 of accumulations of interest, and to have the accounts of the executors re-stated so as to show the time when each installment thereof was received, and to have interest thereon also, if the above figures do not include such interest. (*Phelps v. Pond*, 23 N. Y. 83.)

James D. Bell for Elizabeth R. Westphal, appellant. There was no vesting in Henry C. Crossman of the \$100,000 fund under the third subdivision of the will, and, so far as the disposition of that trust fund, after the death of Caroline E. Crossman, is governed thereby, the testator died intestate, and the *corpus* thereof goes to the next of kin. (*Warner v. Durant*, 76 N. Y. 133, 136; *Smith v. Edwards*, 88 id. 92, 104, 109; *Vawdry v. Geddes*, 1 Russ. & My. 203; *Doe v. Moore*, 14 East, 604; *Vincent v. Newhouse*, 83 N. Y. 505; *Shipman v. Rollins*, 98 id. 325; *DeLafield v. Rollins*, 103 id. 467; *Manice v. Manice*, 43 id. 303, 362; *Teed v. Morton*, 60 id. 502, 506.) Mrs. Crossman has no ownership of the fund, only a beneficial interest by which she can enforce the trust. There is a trust with the whole legal title in the trustees. (1 Perry on Trusts [3d ed.] § 318; *Marx v. McGlynn*, 88 N. Y. 357, 375; *Warner v. Durant*, 76 id. 133.) Reading the residuary clause (7th subd.) in connection with the clause creating the \$100,000 fund (3d subd.), we find that the claim

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that this fund became a part of the residuary estate is unfounded. (*Roseboom v. Roseboom*, 31 N. Y. 356, 358; *Kerr v. Dougherty*, 79 id. 327, 348; *In re Lapham*, 37 Hun, 15, 17; *Peay v. Barber*, 1 Hill, 95.) The income accumulated from the death of the testator to the time when Henry C. Crossman attained the age of twenty-eight years, amounting to \$93,897.35, was improperly paid over to Henry C. Crossman on that day. (*Hobson v. Hale*, 95 N. Y. 588, 616; 1 R. S. 726, 773 · 3 id. [7th ed.] 22, 257, 2178.)

James R. Steers for respondents. If the language of the Revised Statutes in regard to future estates (1 R. S. 672, § 13) is to be applied to this will in its literal meaning, there can be no question that the fund of \$100,000 did vest in Henry C. Crossman when he became twenty-eight, subject to the life interest of Mrs. Crossman. (1 R. S. 727, § 2; *Lane v. Brown*, 20 Hun, 382; *Manice v. Manice*, 43 N. Y. 387; *Gilman v. Reddington*, 24 id. 11; *Lawrence v. Bayard*, 7 Paige, 75; *In re Goodrich*, 2 Redf. 48; *Weed v. Aldrich*, 2 Hun, 531; *Hawley v. James*, 16 Wend. 137; *Gibson v. Walker*, 20 N. Y. 476, 484; 2 Jarman on Wills, 430; *Livingston v. Greene*, 52 N. Y. 118; *Ackerman v. Gordon*, 67 id. 63; *In re McClymont*, 6 Abb. N. C. 263; *Beekman v. Bonsor*, 23 N. Y. 312; *Skrymaer v. Northcote*, 1 Swanst. 570.) The bequest to Henry C. Crossman of the remainder in the \$100,000 fund is not one of those where "futurity is annexed to the substance of the gift" in such sense as to make the remainder to him contingent on his surviving his mother. (*Warner v. Durant*, 76 N. Y. 133; *Scott v. Guernsey*, 48 id. 166; *Teed v. Morton*, 60 id. 502; *Shipman v. Rollins*, 98 id. 311; *Smith v. Edwards*, 88 id. 92; *Delany v. McCormick*, id. 174; *Vincent v. Newhouse*, 83 id. 505; *Hobson v. Hale*, 95 id. 612, 613; *Delany v. Shipman*, 103 id. 463; 18 Abb. N. C. 301.) The income of the residuary estate, given in the seventh subdivision of the will, belonged to Henry C. Crossman from the death of the testator. (1 R. S. 726, § 40; *Manice v. Manice*, 43 N. Y. 384; *Gilman v.*

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Reddington, 24 id. 9; *Grant v. Grant*, 3 Redf. 283; *Cook v. Lowery*, 29 Hun, 20; *Radley v. Kuhn*, 97 N. Y. 26.)

EARL, J. It was held by the surrogate, and upon appeal by the Supreme Court, that Henry C. Crossman took a vested remainder in the \$100,000 which the executors were directed to set apart and hold for the benefit of the widow during her life, and that he took it by virtue of the language contained in the third clause of the will; that, therefore, the testator did not die intestate as to any portion of his estate, and that his next of kin were not entitled to any hearing upon the accounting. Without determining whether or not the courts below were right in their construction of the third clause of the will, we have no reason to doubt that Henry C. Crossman took a vested interest in remainder in the \$100,000 under the residuary clause. It is clear that the testator did not intend to die intestate as to any portion of his estate. He had taken particular care as to the dispositions made in the prior clauses of the will, and it is true that in several of them he provided distinctly that in certain contingencies the gifts should become part of his residuary estate, and that he made no such provision in reference to the \$100,000. But we do not deem that circumstance of much importance. The language of the residuary clause is sweeping and unqualified, and in that he gives, devises and bequeaths to Henry C. Crossman all the rest, residue and remainder "of his estate, real and personal, wheresoever and whatsoever" and what he should thereafter acquire. No language could be broader and more comprehensive, and whatever was not included in the prior provisions and effectually disposed of, is carried under this residuary clause to Henry C. Crossman. He was a general residuary legatee, and therefore, as said in 2 Roper on Legacies (453), "he is entitled to not only what remains after paying all debts and legacies, but also to whatever may by lapse, invalid disposition, or other casualty, fall into the residue after the date and making of the will." And the case is governed by the rule laid down by the chancellor in *King v. Strong* (9 Paige, 94) as follows: "It is

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settled that a general residuary bequest of personal property, or of chattels real, carries to the residuary legatee, not only such estate and such interest therein as the testator did not attempt to dispose of by other provisions of his will, but every part of his property which, by lapse or otherwise, is not effectually bequeathed and disposed of to others." We see nothing in the other provisions of the will to qualify the effect to be given to the general provisions of the residuary clause. It is clear that the testator meant to dispose of all his property, and that he intended by the residuary clause to give to Henry C. Crossman what had not before been effectually disposed of. (*In re Benson*, 96 N. Y. 499; *Cruikshank v. Home of the Friendless*, recently decided in this court.)*

In this case the residuary estate was large, and no direction was given in the will for the disposition of the income thereof until Henry C. Crossman reached the age of twenty-eight years; and the next of kin of the testator, therefore, claim that such income was undisposed of and that they were entitled to the same. We think the disposition of the income is controlled by the provisions of the Revised Statutes (1 R. S. 726, § 40), which provides that "When, in consequence of a valid limitation of an expectant estate, there shall be a suspension of the power of alienation or of the ownership during the continuance of which the rents and profits shall be undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the person presumptively entitled to the next eventual estate." There was no direction whatever for the accumulation of the income. That was undisposed of, and Henry C. Crossman was presumptively entitled to the next eventual estate, and it was, therefore, payable to him as it accrued after the death of the testator. (*Gilman v. Reddington*, 24 N. Y. 9; *Manice v. Manice*, 43 id. 303; *Radley v. Kuhn*, 97 id. 26.) The provision of the Revised Statutes strictly applies only to the rents and profits of real estate. But, by analogy, the same rule should, probably, be applied to the income of personal estate. But, so far

* *Ante*, p. 337.

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as the residuary estate was personal, its income belonged to Henry C. Crossman as the owner of the *corpus* thereof, and, not being otherwise disposed of, was payable to him as it accrued. It would seem to be a reasonable rule that such an owner should have the income of his own property.

We are, therefore, of opinion that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

THOMAS H. O'CONNOR, as Executor, etc., Respondent, v.
JOHN P. HUGGINS, Appellant.

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In an action to compel the specific performance of a contract on the part of defendant to purchase certain property situate in the county of New York, these facts appeared: C. died intestate in Indiana in 1845, seized of the premises. In 1850 one P., a creditor of C., obtained letters of administration of his goods, etc., from the Surrogate's Court of Richmond county. The petition upon which the letters were granted stated that C. "died possessed of personal property in the state of New York." Subsequently, and before letters were issued, the petitioner presented an affidavit showing the existence of assets in Richmond county. The letters recited that C. left assets unadministered in said county. P. subsequently made due application for authority to mortgage, lease or sell the real estate of C. for the payment of his debts, and in 1851 such authority having been granted, the premises in question were sold to plaintiff's testator A., who died in 1872. In 1886 the agreement in question was executed between his executors and defendant. Defendant objected to the title that the Surrogate's Court did not acquire jurisdiction to issue letters to P as administrator of C., and that the proceedings instituted by P. for a sale of the real estate were defective and ineffectual to confer any title to the land. *Held*, untenable; that the statutory requirement of assets in the county was met by the petitioner; that the recital in the letters was *prima facie* evidence of the existence of the facts stated, and the record showed that the necessary facts were alleged and proved upon which the surrogate acted in granting them; that his determination upon the proofs, however erroneous, cannot be disturbed by an attack upon it in a collateral proceeding. Although Surrogates' Courts are courts of special and limited jurisdiction, where jurisdiction to act exists their orders or decrees are conclusive until they are revoked or reversed on appeal. (2 R. S. 80, § 56.)

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That conclusiveness, in the absence of fraud or collusion, attaches in a case where a jurisdictional fact is in question and it appears there was proof with respect to its existence, upon which the surrogate decided.

A surrogate is not confined to any form of procedure or mode of proof in acting upon an application for letters of administration, and may take proof by affidavit.

It was claimed, and it appeared, that the order to show cause why a sale should not be had was made returnable one day later than the time limited by statute, which requires all persons interested to appear at a time and place specified, "not less than six weeks nor more than ten weeks from the time of making such order." (3 R. S. 107, § 5.) *Held*, that there was no substantial departure from the requirements of the statute; that if there was an irregularity, it was not one which abridged the rights of anyone, and was not a jurisdictional defect.

Stikwell v. Swarthout (81 N. Y. 109) distinguished.

The trial judge found, upon sufficient evidence, that plaintiff's testator had been in continual occupation and possession of the premises in question under a claim of title founded upon deeds from 1851; that the lands had been protected by a substantial enclosure; that plaintiffs and their testator had paid the taxes and assessments upon the same. After testator's death the plaintiffs had rented the premises. There was no proof or pretense of any other claim to the property lying either in grant or in claim. *Held*, that a valid grant must be presumed as arising from an exclusive and uninterrupted possession under a claim of title founded on a conveyance for more than twenty years; that such a presumption will always displace objections based on flaws in the proceedings in which the title has had its source and protect it from being injured by their disclosure.

The time for the completion of the purchase was extended by mutual consent to January 17, 1887. *Held*, that interest on the purchase-money should be computed from that time only.

(Argued April 18, 1889; decided May 3, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 13, 1887, which affirmed a judgment in favor of plaintiffs, entered upon a decision of the court on trial at Special Term.

This was an action for the specific performance of a contract for a sale of real estate in the city of New York.

The facts, so far as material, are stated in the opinion.

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Francis B. Chedsey, for appellant. The question as to whether the estate of Isaac F. Craft, deceased, was within the jurisdiction of the county judge of Richmond county, and his authority to issue letters of administration, under which proceedings were instituted for the sale of the real property, is involved in such doubt that a purchaser ought not to be required to accept a title depending upon the determination of that question. (*Roderigas v. E. R. S. Inst.*, 76 N. Y. 323; *Sibley v. Waffle*, 16 id. 189; *Shriver v. Shriver*, 86 id. 575; *Cochran v. Fitch*, 1 Sandf. Ch. 145; *Mulcahey v. E. I. S. Bank*, 89 N. Y. 438; 1 Parsons on Contracts, 31; 76 N. Y. 323; *Fleming v. Burnham*, 100 id. 1.) The order to show cause upon which the order of sale was based was made returnable one day later than the time limited by the statute, and that vitiated the proceeding. (2 R. S. 101, § 5; *Fleming v. Burnham*, 100 N. Y. 1.) The publication of the order to show cause, as returnable on the ninth day of January instead of the twenty-eighth, was fatally defective. (*Sibley v. Waffle* 16 N. Y. 187, 189.) The plaintiffs have not shown title in their testator resting in adverse possession, by evidence so clear and of such a substantial character as to leave no room for opposing inferences or for a different conclusion on a new inquiry. (*Jackson v. Woodruff*, 1 Cow. 276; *Pope v. Hanmer*, 74 N. Y. 240; *Florence v. Hopkins* 46 id. 136; *Thompson v. Burnhans*, 89 id. 99; *Yates v. Van de Bogert*, 56 id. 526; *Jackson v. Schoonmaker*, 2 Johns. 229.) The question whether the defendant was bound to accept a title resting in adverse possession, had such title been shown, may be considered an open question in this court. (*Hartley v. James*, 50 N. Y. 38; *Mott v. Mott*, 68 id. 246; *Shriver v. Shriver*, 86 id. 575, 586.)

Charles E. Miller for respondents. Letters of administration granted by the surrogate are conclusive as to his authority. (*Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48, 55; *Roderigas v. East River Sav. Bk.*, 63 id. 460; *Kelly v. West*, 80 id. 139; *Farley v. McConnell*, 7 Lans. 428; 52 N. Y. 630;

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Van Dusen v. Sweet, 51 id. 378, 385; *Johnson v. Smith*, 25 Hun, 176; *Sheldon v. Wright*, 5 N. Y. 497; *Porter v. Purdy*, 29 id. 106.) Such a decree cannot be collaterally impeached or attacked, and is conclusive, unless reversed on appeal or revoked by the surrogate himself (*Wetmore v. Parker*, 52 N. Y. 450; *Matter of Harvey*, 3 Red. 214) for the reason that the surrogate must, of necessity, have passed upon that question before he admitted the will to probate. (*Bolton v. Brewster*, 32 Barb. 389; *Porter v. Purdy*, 29 N. Y. 106.) The statute conferring jurisdiction upon the surrogate does not require preliminary proof to be made before him of the facts upon which his jurisdiction depends. (*Sheldon v. Wright*, 1 Seld. 497, 511.) The only proof to be taken before the surrogate is that the deceased died intestate. (2 R. S. 74, § 26.) Nor is a petition essential; and if there be a petition, it is not necessary that any of the facts conferring jurisdiction should be stated in it. (*Johnston v. Smith*, 25 Hun, 176.) The return day of the order to show cause why a sale should not be had was within the time prescribed by statute. (Bouvier's Law Dictionary; *Ronkendorff v. Taylor's Lessee*, 4 Peters, 93; *Bachelor v. Bachelor*, 1 Mass. 256; *Olcott v. Robinson*, 21 N. Y. 150; *Cornell v. Moulton*, 3 Denio, 12; *Judd v. Fulton*, 10 Barb. 117; *Vandenburgh v. Van Rensselaer*, 6 Paige, 147.) If it be held that it was not returnable until the day after the expiration of the tenth week, it is submitted that the statute was substantially complied with. The object of the statute was to give ample notice to all persons interested. (*Stillwell v. Swarthout*, 81 N. Y. 109.) Any omissions or irregularities in the proceedings of sale are answered by the statutory provisions validating surrogate's sales. (3 R. S. [5th ed.] 192, 193, 198, §§ 38, 39, 70.) The judgment of the Surrogate's Court is conclusive on the jurisdictional fact of publication of the notice. (*Sheldon v. Wright*, 1 Seld. 497-517.) A clear adverse possession for twenty years makes a title which a purchaser at a judicial sale may not refuse. (*Shriver v. Shriver*, 86 N. Y. 575, 581; *Othinger v. Strassburger*, 33 Hun, 466.)

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GRAY, J. The defendant has objected to the title proffered by the plaintiffs, on the ground that it was not a good and marketable one, and he bases his objection on the invalidity of a sale of the premises made to the plaintiffs' testator in 1851. Isaac F. Craft acquired the title to the premises in 1828, and, while seized of them, died intestate in Indiana, in 1845. In 1850 one Pell, a creditor of Craft, obtained the grant to himself of letters of administration of the goods, etc., of the intestate from the Surrogate's Court of the county of Richmond, in this state. Subsequently to his obtaining this grant of letters, the administrator made due application for authority to mortgage, lease or sell the real estate of the intestate for the payment of his debts, and, in 1851, such authority being granted, the premises were sold to the plaintiffs' testator, Andrew Carrigan. Carrigan lived in a mansion-house, upon a tract of land, of which the premises in question formed a part, until his death. In 1873 letters testamentary on his estate were granted to these plaintiffs, who had been named in his last will as his executor and executrix. They sold the premises in question here to the defendant at public auction, in 1886, and the agreement was then executed, to enforce which the plaintiffs have brought this action. The defendant raises two distinct questions with respect to the acquisition of title by the plaintiffs' testator. The first is that the Surrogate's Court of Richmond county did not acquire jurisdiction to issue the letters to Craft's administrator; and the second is that the proceedings, instituted by the administrator for a sale of the real estate, were defective in certain respects, and hence were ineffectual to confer any title to the land. The objection, which goes to the granting of the letters of administration, proceeds on the theory that the recital in them, that Craft left assets unadministered in the county of Richmond, by reason whereof jurisdiction to grant administration thereupon appertained to the surrogate of said county, was disproved by the evidence upon the trial.

It is true that, in the petition for the granting of the letters, it was stated generally that the intestate "died possessed of

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certain personal property in the state of New York," etc., and that the particular *situs* of the property in the county was not alleged; but, before the letters issued, further facts were alleged, by the affidavit of the petitioner, showing the existence of assets in that county. Thus the fact which existed to give jurisdiction to the surrogate to act, but which was not precisely stated in the petition of the administrator, was made to appear before the rendering of the decision upon the application. The statutory requirement of a jurisdictional fact was met by the production, by the applicant, of proof of its existence. The recital in the letters was *prima facie* evidence of its existence; and the record shows that the necessary facts were alleged, upon which the surrogate acted in granting them. His determination upon the proof cannot be disturbed by an attack upon its correctness, in a collateral proceeding. Surrogates' Courts, though established as courts of special and limited jurisdiction, have possessed the general and exclusive jurisdiction to order the administration upon the estates of deceased persons, and, where jurisdiction to act exists, their orders and decrees are made conclusive until they are revoked, or reversed on appeal. (2 R. S. 80 § 56.) That conclusiveness attaches in a case where a jurisdictional fact is in question, and it then appears that there was proof with respect to its existence, upon which the surrogate decided. His adjudication, in the exercise of his general and exclusive jurisdiction, where jurisdictional facts, necessary to the possession of that jurisdiction, appear to have been alleged, and when the necessary parties have been duly cited to appear before him, is not thereafter open to collateral attack. Power to affect the adjudication resides in the court which made it, and in the court to which it may be appealed; but otherwise it is not open to question. This principle, of course, in its application to other parties affected, implies the absence of fraud, or collusion. It is not material how the decision was reached; provided the facts, which confer power to act, were alleged. The surrogate was not confined to any form of procedure, or to any mode of proof, in acting upon an application for letters. The defect in the

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allegations of the petition was supplied by allegations in a subsequent deposition, and we are bound to presume that, prior to issuing the letters, the surrogate deliberated and decided upon the right of the petitioner.

The plea, when urged collaterally, that the decision was erroneous, must always be unavailing. For its errors the remedy was by a direct proceeding for their correction, and subsequent proceedings, which rest upon the decree, will not be affected, however erroneous the adjudication may be urged to have been. (*Porter v. Purdy*, 29 N. Y. 106.)

The conclusiveness of letters of administration as to the authority of the surrogate has been the text of several decisions by this court. In *Roderigas v. East River Savings Institution* (63 N. Y. 460) it appeared that, at the time when certain letters of administration had issued, the alleged intestate was yet living, and the due statutory proofs of his death, upon which the surrogate acted, were shown not to have been founded in the fact. The defendant was sued for moneys, which it had paid over on the demand of the previous administrator, by the plaintiff, to whom letters were subsequently issued upon proofs of death. This court held that no recovery could be had against the defendant. In the opinion it was said: "Where general jurisdiction is given to a court over any subject, and that jurisdiction depends, in a particular case, upon facts which must be brought before the court for its determination upon evidence, and where it is required to act upon such evidence its decision upon the question of its jurisdiction is conclusive until reversed, revoked or vacated, so far as to protect its officers and all other innocent persons who act upon the faith of it." In *Kelly v. West* (80 N. Y. 139) the objection was raised that letters of administration were wholly void, because issued without any citation to the widow or renunciation by her. The objection was overruled, and it was said that "the surrogate had jurisdiction to grant the letters, and hence the statute makes them conclusive evidence of the authority of the persons to whom they were granted until revoked or set aside." In *Leonard v. Columbia Steam*

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Navigation Company (84 N. Y. 48) it was said that "the letters of administration granted by the surrogate are conclusive as to his authority. * * * The letters on their face show that the intestate died leaving assets in the state and in the county of New York, and this gave the surrogate of the county of New York jurisdiction."

In the present case, all things concur to warrant the application of this rule of conclusiveness. There was the death of the party, while a non-resident of the state, and there was the allegation of assets in the county of Richmond, where the letters were issued. In order to the grant of letters, it was incumbent upon the surrogate to act judicially and to decide, whether it was a case in which he should order administration at all. The persons entitled as next of kin of the deceased were served with a citation to appear in the proceeding, and none appeared to oppose. More than thirty-six years elapsed between the granting of the letters and the sale to the defendant, and, during that time, no move appears to have been made, nor any step to have been taken by the parties, affected by the proceeding, which the records of the Surrogate's Court in Richmond county reveal.

The defect, asserted to exist in the proceedings instituted by the administrator for the sale of the decedent's real estate, is that the order to show cause why a sale should not be had was made returnable one day later than the time limited by statute. The theory of this ground of contention is, that, as the proceeding was purely statutory, jurisdiction depended upon strict compliance with the statutory requirement. The statute then in force, with respect to such sales, provided that the order should require all persons interested to appear, at a time and place specified, "not less than six weeks and not more than ten weeks from the time of making the order." The date of the order was November 18, 1850, and, the return day mentioned in the order was January 28, 1851. The number of days, by computation, was thus seventy-one; and, if we should estimate the weeks as commencing with the day when the order was granted, the return day was one day beyond the ten weeks.

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. We think it a sufficient answer to the defendant's objection that there was no substantial departure from the requirements of the statute, and that the lengthening of the time for appearance by a day could not prejudice the parties interested, and, therefore, the rule in *Stilwell v. Swarthout* (81 N. Y. 109) would not apply; in which case the error consisted in the order being made returnable four days less than the minimum time prescribed by statute. That was considered and said to be a substantial departure from the requirements of the statute, and one which went to the foundation of the proceeding. What the legislature had in view was the purpose to grant full opportunity to all persons in interest to be heard in the proceeding. It is obvious that the addition of a day to the statutory time cannot be deemed to be any impairment of that opportunity, or to work any possible prejudice to rights. If it was an irregularity at all, it was not one which abridged the rights of anyone, and, therefore, could not affect the foundation of the proceedings.

There appears to have been a mistake in the publication of the order to show cause in the Richmond county paper, by which the date of the return day was erroneously given as the ninth, instead of the twenty-eighth of January. The statute in force at the time provided that every order to show cause, made upon an application for authority to lease, mortgage or sell real estate, should be published. (2 R. S. 101.) Section 5 of the article required that "every such order to show cause shall be published for four weeks in a newspaper published in the county," and that a copy of the same should be served on the widow, heirs or devisees of the deceased. By the tenth section of the article, when the heirs or devisees did not reside in the state, the order was to be published once in each week, for six weeks successively, in the state paper. The petition of the administrator showed that the heirs of the deceased all resided out of the state, except a sister, who resided in the city and county of New York. The premises to be sold were situated in the city and county of New York. Publication was correctly made, as required by the statute, in the state

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paper, and, also, in a paper published in the city and county of New York; and the publication in the paper in Richmond county was actually made for four weeks. It is not readily to be seen how, in the case of non-residence of the parties interested in opposing the application, and when the real estate to be sold was in New York county, that publication in Richmond county was important; or for what purpose it should be made there. The parties it was intended to reach, plainly, were the widow and heirs; because section 11 of the article mentions as the persons, whom the surrogate shall hear on the return day, "the executors, administrators and all persons interested in the estate who shall think proper to oppose the application." And the thirteenth section speaks of the competency of any heir or devisee, or any person claiming under them, to show cause in opposition. The proceeding being instituted in behalf of creditors of the estate, they could have no interest, nor reasonable desire, to oppose a proceeding, whereby the estate was to be realized upon for their payment. The parties interested in the estate, of whom the statute speaks, are to be taken to mean those having some actual interest in the real estate of the deceased. But it is thought that, inasmuch as the language of the statute in the ninth section referred to, provides that "every such order to show cause shall be published for four weeks in a newspaper published in the county," such a publication may be a jurisdictional prerequisite, and that an error in such a publication, such as that alleged here, affects the proceeding. Whatever the doubt which may be entertained on that point, we deem it unnecessary to pronounce upon it authoritatively; either as to the soundness of the point, or as to its materiality with respect to the proceeding in question. The record before us discloses the foundation for a good title by adverse possession; commencing under the administrator's deed and continuing, with acts of dominion over the property, during the grantee's lifetime, and, since his death, by the plaintiffs, in whom his will vested the legal title.

Among the facts found by the trial judge were these: That

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the plaintiffs' testator had been in continual occupation and possession, under a claim of title founded upon deeds, from 1851; that the lands had been protected by a substantial enclosure, and that the plaintiffs and their testator had paid the taxes and assessments upon the same. The finding as to occupation was amply supported by evidence of a convincing character, and in which I fail to see any conflict as to the fact. Witnesses testified concerning the land, and its enclosure and uses, and some, to knowing plaintiffs' testator from 1851 down to the time of his death. He resided in an old mansion on the property; which consisted of a farm, or tract of land, in the city of New York, and the general boundaries of which were the Eleventh avenue and Broadway, on the east and west, respectively, and One Hundred and Sixteenth street and a lane running between One Hundred and Eleventh and One Hundred and Twelfth streets, on the north and south, respectively. It was testified that this tract was known as the Carrigan estate, or homestead. It was and has been inclosed by fences, or retaining walls, and was used, in part, for pasturing purposes and, in part, was cultivated. After their testator's death the plaintiffs rented the premises. There is no proof nor pretense of any other title to the property, lying either in grant or in claim. Nor does anything appear to disturb the conclusiveness of the presumption of a valid grant, which arises from an exclusive and uninterrupted possession of the property, under a claim of title founded on a conveyance, for a period extending far beyond the length of time mentioned in the statute of limitations. Such a presumption will always displace objections, based on flaws in the proceedings, in which the title has had its source, and protect the title from being injured, or affected by their disclosure.

We think there was no ground upon which the defendant's refusal to complete the purchase, upon this sale to him, could be justified, and that the title offered was a good and marketable one.

In view of the plaintiffs' consent to the extension of the time to January 17, 1887, for the completion of the contract of

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purchase, interest on the purchase-money ought to be computed from that date only.

The judgment should, therefore, be modified in that respect, and, as so modified, it should be affirmed, with costs to the respondents.

All concur.

Judgment accordingly.

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141 84

In the Matter of the Estate of ZALMON BONNET on the Appeal
of DYCKMAN ODELL.

B., by the second clause of his will, gave a legacy of \$5,000 to the wardens of St. John's P. E. Church at Wilmot, in trust, to apply the income to the relief of the poor of the parish. This legacy was held to be void because of indefiniteness as to the beneficiaries. The residuary clause of the will reads as follows, viz. : "All the rest, residue and remainder of my estate, after the payment of my just debts, funeral and testamentary expenses, I give and bequeath to the said wardens and vestrymen of the St. John's church aforesaid, and to their successors, to be applied by them as they may deem most beneficial to the prosperity of the church." *Held*, that in the absence of anything in the will showing a contrary intent, the void legacy, as well as certain others which lapsed, fell into the residuary estate and passed to the donee thereof. If the title of a residuary legatee is not narrowed by special words of unmistakable import, the gift will carry with it all that falls into the residue, whether by lapse, invalid disposition or other accident. Reported below, 46 Hun, 529.

(Argued April 22, 1889; decided May 8, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 19, 1887, which affirmed so much of a decree of the Surrogate's Court of Westchester county as adjudged that certain lapsed legacies given by the will of Zalmon Bonnet, deceased, and one adjudged to be void, passed to the residuary legatee.

The facts material to the question discussed are sufficiently stated in the opinion.

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Thomas Nelson for appellant. The words "rest, residue," etc., necessarily presume something before taken, and can only apply to what is left. They exclude the antecedent gifts in the natural way of construing a will. (*Smith v. Saunders*, 2 Black. 736.) As the will evinces an intent not to give to the residuary legatee the legacy intended for another purpose, but which has miscarried by the prohibitions of the law, it then becomes undisposed of by the will, and, from the partiality of the law towards heirs and next of kin, they become entitled to the same. The presumption in their favor is not to be counteracted by the courts, unless by clear words or necessary implication the will points out one who is to take adversely. (*Green v. Dennis*, 6 Conn. 292; *Van Vleeck v. Ref. D. Ch.*, 6 Paige, 606; *Kerr v. Dougherty*, 17 Hun, 241; 79 N. Y. 327; *Stephenson v. O. O. Asylum*, 27 Hun, 383; 92 N. Y. 433; *Iserman v. Myer*, 26 Hun, 651; *Goodwin v. Ingraham*, 29 id. 221.)

William H. Sage for respondent. The lapsed and void legacies fall into the residuary estate and pass to St. John's Church, and are not distributable to the next of kin as properly undisposed of by the testator. (*In re Benson*, 96 N. Y. 499, 510; *Wetmore v. Peck*, 66 How. Pr. 54; *In re L'Hommiedieu*, 32 Hun, 10; *Lefevre v. Lefevre* 59 N. Y. 446; *King v. Strong*, 9 Paige, 94; *Banks v. Phelan*, 4 Barb. 80; *Floyd v. Barker*, 1 Paige, 480; *Kerr v. Dougherty*, 79 N. Y. 327; *Betts v. Betts*, 4 Abb. N. C. 317.) The description of the residuary legatee in the will is sufficient, for the rule is that where the description in the will shows what legatee the testator had in mind, it will carry the bequest whether the description is the legal title of the legatee or not. (*Lefevre v. Lefevre*, 59 N. Y. 434; *N. Y. Inst. for the Blind v. How*, 10 id. 88, 92; *Greer v. Belknap*, 63 How. Pr. 390; *Canfield v. Crandall*, 4 Dem. 111; *Matter of Wehrhane*, 40 Hun, 542; *Shipman v. Rollins*, 98 N. Y. 311; *St. Luke's Home v. Assn. of Aged Females*, 52 id. 191; *R. C. O. Asylum v. Emmons*, 3 Bradf. 144; *Holmes v. Mead*, 52 N. Y. 332, 343.) The law

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prefers a construction of a will which will prevent a partial intestacy to one which will permit it. (*Vernon v. Vernon*, 53 N. Y. 351, 361; *Thomas v. Snyder*, 43 Hun, 14.)

GRAY, J. The only question which we are asked to pass upon relates to the effect which is to be given to the eighth, or residuary clause of the will, in this record. That clause reads as follows, viz.: "All the rest, residue and remainder of my estate, after the payment of my just debts, funeral and testamentary expenses, I give and bequeath to the said wardens etc., of St. John's church and to their successors, to be applied by them as they may deem most beneficial to the prosperity of the church, * * *" etc. By the second clause the testator had given a legacy of \$5,000 to the wardens of St. John's church, in trust to apply the income to the relief of the poor of the parish. This legacy of \$5,000 was held below to be void, because of the indefiniteness of the beneficiary, and that determination has been acquiesced in. But the appellant, one of the testator's next of kin, contends that it was error in the surrogate to hold that the sum, so ineffectually given in the will, fell into the residuary estate. He argues that such a decision does not harmonize with the testator's intention; for the reason that the intention to give \$5,000 for the benefit of the poor is irreconcilable with the idea of an intention, at the same time, to give the same sum for the benefit of the church solely. The decision of this appeal must be governed by the principle of our recent decisions in the cases of *Riker v. Cornwell* (*ante p.* 115) and *Cruikshank v. Home of the Friendless* (*ante p.* 337.) In those cases the doctrine of lapsed and void legacies and the rule as to residuary clauses were considered and the authorities reviewed. We hold that, unless a contrary intent unequivocally appears elsewhere in the will, a lapsed or void legacy will be carried by a general gift of the residuum of the testator's estate. If the title of a residuary legatee is not narrowed by special words of unmistakable import, the gift will carry with it all that falls into the residue, whether by lapse, invalid disposition, or other accident.

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In this case the gift of the residue is universal. It is in general terms of all that remains after the payment of debts and of funeral and administration expenses. Such language takes in, of its own force, whatever, in the testamentary disposition of the testator, has failed of effect, and negatives the idea of the gift of a specific residue. No intention to exclude anything from the residuary estate appears anywhere, and the presumption to include obtains. The testator has constituted, by the language used, the wardens, etc., of St. John's Church as the universal legatees of all of his estate, which was not elsewhere by his will effectually or validly given. If he has previously ineffectually given to the same persons a particular legacy for a different purpose, it does not, by any means, legally or logically, follow that they should not, as the general residuary legatees, take the sum mentioned in the legacy, which has been pronounced illegal. The sum intended for the illegal purpose will go to swell the estate generally given, for the purpose mentioned in the residuary clause.

The judgment should be affirmed, with costs to the respondent, to be paid out of the estate.

All concur.

Judgment accordingly.

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113	526
124	361
124	365
113	526
127	555
113	526
130	427
113	526
145	347

ELMER T. HARVEY, who Sues, etc., Appellant, v. LUCY McDONNELL, Administratrix, etc., et al., Respondents.

Where administrators, upon application of a creditor of their intestate, refuse to exercise the power conferred upon them by the act of 1858 (§ 1, chap. 314, Laws of 1858), to disaffirm a transfer made by said intestate to one of the administrators in fraud of the rights of creditors and to reclaim the property fraudulently conveyed, and where the estate in the hands of the administrators proves insufficient to pay the debts, the creditor may bring an action for his own benefit and that of the other creditors to reclaim the property, making all the administrators parties. It is not essential that the plaintiff in such an action should be a judgment creditor; he stands simply as trustee in place of the administrators.

Lichtenberg v. Herdtfelder (103 N. Y. 302) distinguished.

Harvey v. McDonnell (48 Hun, 409) reversed.

(Argued April 18, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made the first Tuesday of May, 1888, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial.

The nature of the action and the material facts are stated in the opinion.

Edward F. Bullard for appellant. The administrators could maintain an action to set aside this deed for the benefit of all creditors, whether they held a judgment or not. (*Southard v. Benner*, 72 N. Y. 424; *Potts v. Hart*, 99 id. 168; *Barton v. Hosmer*, 24 Hun, 467.) The defendants having neglected to perform their duties as trustees upon request, the plaintiff, as a general creditor, had a right to put them in motion by bringing this action. (*Bate v. Graham*, 1 Kern. 237; *Bates v. Bradley*, 24 Hun, 84; *McCartney v. Bostwick*, 32 N. Y. 57; *Raynor v. Gordon*, 23 Hun, 264; *Fleiss v. Buckley*, 90 N. Y. 287; *Platt v. Platt*, 105 id. 488; *Johnson v. Waters*, 111 U. S. 640, 671; *Weed v. Hornby*, 35 Hun, 581; *Dewey v. Moyer*, 72 N. Y. 90; *Overton v. Village of Olean*, 37 Hun, 49; 3 Pomeroy's Eq. § 1095;

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Randall v. Dyett, 38 Hun, 347, 349; *Chadwick v. Burrows*, 42 id. 44; *Jones v. Jones*, 4 N. Y. S. R. 141; *Crouse v. Frothingham*, 97 N. Y. 114; *Lichtenberg v. Herdtfelder*, 103 id. 302, 307; *U. P. R. R. Co. v. Dull*, 124 U. S. 172; *In re Cornell*, 110 N. Y. 316; *Platt v. Platt*, 2 T. & C. 25.) Equity will give relief where there is no other remedy. (*Clute v. Emmerich*, 99 N. Y. 346; *Perry v. Bd. of Missions*, 102 id. 99.) Debts are an equitable lien upon property fraudulently transferred. Every debtor is a trustee for his creditor. (*O. N. Bk. v. Olcott*, 46 N. Y. 17; *Dewey v. Moyer*, 71 id. 70, 76.)

Nathaniel C. Moak for respondents. A creditor who has no lien upon property he is seeking to reach, and is not seeking to remove a fraudulent obstruction to the enforcement of that lien, must be a judgment-creditor with an execution returned *nulla bona*. (Code of Civ. Pro. §§ 1371, 1823, 1825, 1826, 1871, 1872; *Adsit v. Butler*, 87 N. Y. 585, 590; *Estes v. Wilcox*, 67 id. 264; *Allyn v. Thurston*, 53 id. 622; *Geerey v. Geerey*, 63 id. 252, 255-257; *Crippen v. Hudson*, 13 id. 161; *Voorhies v. Howard*, 4 Abb. Ct. App. Dec. 504; *Beardsley v. Foster*, 36 N. Y. 561, 563, 565; *Foster v. Waller*, 25 id. 434; *Sullivan v. Miller*, 106 id. 635, 636, 641-643; 11 N. Y. State Rep. 312; *Lichtenberg v. Herdtfelder*, 103 N. Y. 302; 33 Hun, 57; *Taylor v. Boker*, 111 U. S. 110, 115, 116; *Jones v. Green*, 1 Wall. 330-332; *National, etc., v. Wetmore*, 42 Hun, 359, 362; *Andrew v. Vanderbilt*, 37 id. 468-472; *Bowe v. Arnold*, 18 Week. Dig. 326; 31 Hun, 256; *Gardner v. Lansing*, 28 id. 415; *Genesee River, etc., v. Mead*, 13 Week. Dig. 356; 18 Hun, 303; 25 id. 310; *Kerr v. Dildine*, 26 Week. Dig. 70; 43 Hun, 635; *Jacobstein v. Abrams*, 41 id. 272; *Briggs v. Van Buren*, 19 Week. Dig. 216; 32 Hun, 640; *Albany City, etc., v. Gaynor*, 67 How. 421; *Throop Grain, etc., v. Smith*, 110 N. Y. 83, 87; 26 Week. Dig. 72; *Burnett v. Gould*, 27 Hun, 366, 368, 369; *Eastern Nat. Bk. v. Buffalo, etc.*, 48 id. 557, 560; *Levy v. Nat. Bk.*, 17 N. Y. State Rep. 529, 531; *Adel v. Bigler*, 81 N. Y. 349; *Webster v.*

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Clark, 25 Me. 313, 314, 316; *Gould v. C. C. Bk.*, 86 N. Y. 75, 83, 84; 99 id. 333; *Reubens v. Joel*, 13 id. 488; *Goulet v. Asseler*, 22 id. 225; *Royer Wheel Co. v. Fielding*, 31 Hun, 274-279; *Brinckerhoff v. Brown*, 4 Johns. Ch. 674; *Shaw v. Dwight*, 27 N. Y. 244; *Loomis v. Tift*, 16 Barb. 641.) The want of an averment of the proper issuing and return of an execution cannot be supplied by an allegation of a total want of property. (*Crippen v. Hudson*, 13 N. Y. 165; *Estes v. Wilcox*, 67 id. 264, 266, 267; 87 id. 589; *McElwain v. Yardley*, 9 Wend. 548; *Beardsley Scythe Co. v. Foster*, 36 N. Y. 563-565; *Dunlevy v. Tallmadge*, 32 id. 459-461; *Adsit v. Butler*, 87 id. 585, 587-590; *Gardner v. Lansing*, 28 Hun, 415, 416; *N. T. Bk. v. Wetmore*, 42 id. 359, 362, 363; *Allyn v. Thureston*, 53 N. Y. 622; *O. N. Bk. v. Olcott*, 46 id. 12; *Loomis v. Tift*, 16 Barb. 541; *Spicer v. Ayers*, 2 T. & C. 624; *Geerey v. Geerey*, 63 N. Y. 252; *Evans v. Hill*, 18 Hun, 464; *Adsit v. Sanford*, 23 id. 45; 87 N. Y. 585; *Lichtenberg v. Herdtfelder*, 103 id. 302; 33 Hun, 57, 59; *Royer Car Wheel Co. v. Fielding*, 31 id. 274; *Bowe v. Arnold*, Id. 256; *Andrew v. Vanderbilt*, 37 id. 468, 471; *Southard v. Benner*, 72 N. Y. 424; *Crouse v. Frothingham*, 97 id. 105.) Nor can plaintiff sustain this suit under the act of 1858 (Chap. 314). It simply authorized and gave "any executor, administrator, receiver, assignee or other trustee of an estate, or the property and effects of an insolvent estate, corporation, association, partnership or individual" power to sue in cases where it was previously doubtful whether they could maintain an action. (*Hyde v. Lynde*, 4 N. Y. 387; *Kennedy v. Thorp*, 51 id. 174; *Gardner v. Lansing*, 28 Hun, 416; *Southard v. Benner*, 72 N. Y. 42; *Lichtenberg v. Herdtfelder*, 103 id. 306, 307; *In re Kellogg*, 39 Hun, 275; *Geerey v. Geerey*, 63 N. Y. 252, 256; *Adsit v. Butler*, 87 id. 585; *Estes v. Wilcox*, 67 id. 264, *O. N. Bk. v. Olcott*, 46 id. 12, 22; 104 id. 648; *Harvey v. McDonnell*, 48 Hun, 409, 411-414; *National Bk. v. Levy*, 17 N. Y. State Rep. 529, 532; *Genesee, etc., v. Mead*, 18 Hun, 363; *Barton v. Hosner*, 24 id. 467; 72 N. Y. 427; *Phelps v. Platt*, 50 Barb. 430, 431; *Dewey v.*

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Moyer, 72 N. Y. 70; 103 U. S. 301; 9 Hun, 473; *Bate v. Graham*, 11 N. Y. 237, 240; *Potts v. Hart*, 99 id. 168.)

DANFORTH, J. The complaint shows the plaintiff Harvey to be a creditor of the decedent, John McDonnell, by virtue of certain contract obligations, to the amount of \$2,000 and upwards, and that upon the death of McDonnell the defendants were appointed his administrators. They recognized the validity of his claims and paid dividends thereon from the proceeds of the land sold by order of the surrogate. The property coming to their hands as such representatives has been exhausted and there still remains due the plaintiff the balance above referred to. The complaint further states that, shortly before his death, the decedent, to defraud his creditors, caused a certain other portion of his land to be conveyed without consideration to Lucy McDonnell, his wife, and that she retains it and also some personal property which she claims to be her own. The plaintiff has requested the defendants to take proceedings to set aside these transfers, and they have declined to do so. He therefore brings this action in behalf of himself and all other creditors of the decedent against Lucy McDonnell, individually and as administratrix, and against the other defendant as administrator of John McDonnell. He asks that the fraudulent conveyances be canceled, that an account be rendered by the defendant Lucy, a receiver appointed, and a distribution made of such moneys as may come to his hands among the creditors of the intestate. The defendants answered jointly, setting up, in substance, a general denial and also the statute of limitations. No objection was taken by answer to the sufficiency of the complaint, but, on the trial, upon motion of the defendants' counsel, it was dismissed upon the sole ground that the plaintiff was not a judgment-creditor. The cases cited by the learned counsel for the respondents afford many instances where the right of a creditor to proceed in equity against the property of his debtor has been denied by reason

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of his failure to exhibit a judgment and execution. They show the rule to be well settled that a creditor at large, or a simple contract creditor, must sue at law, establish his debt and then exhaust, by such proceeding as the law allows, the real estate on which the judgment is a lien, and the personal property liable to execution, before he proceeds against property which is not subject to either judgment or execution. The plaintiff has done neither, and he is a contract creditor of the decedent, John McDonnell. But this is not all. He is a claimant against the estate, his claim has been allowed, and the representatives of McDonnell have exhausted the property which has come to their hands, both real and personal, by applying it upon the debts of the intestate, and, among others, the plaintiff's claim. It is not wholly satisfied, and the plaintiff points out other property once, confessedly, belonging to the decedent, but, as alleged by the plaintiff, conveyed away in fraud of the rights of creditors. He has asked the defendants, as administrators of McDonnell, to pursue it and set aside the fraudulent conveyances. If the allegation is true, they might do so, and it would then be their duty to apply the proceeds in the due course of administration. The plaintiff would receive his share, not by virtue of his own action, but because of the character which the administrators bear in relation to the estate, and the power conferred upon them by statute. They stand as trustees for the creditors (Laws of 1858, chap. 314, § 1), and for their benefit, may disaffirm and treat as void any transfer or agreement made in fraud of the rights of any creditor interested in any property or right belonging to the estate they represent. (Id.) The same act confers like power upon assignees for the benefit of creditors, and in favor of such a one we held that he had greater power to seek for and reclaim property fraudulently conveyed than the creditor himself, for "the creditor can assert no right until by judgment and execution he has a lien, or a right to a lien, upon the specific property, but in favor of an assignee for his benefit the legislature have substituted a statutory right in place of these conditions."

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(*Reynolds v. Ellis*, 103 N. Y. 115.) The same construction applies here. But the administrators do not avail themselves of the power given to them by statute. It was their right and duty to do so. They have been applied to and refuse. Is the creditor, therefore, without a remedy? Clearly not. Upon the face of the complaint it is apparent that the administratrix has an interest adverse to the creditors of the estate. They call for property which she claims to own in her own right, and which she refuses to apply upon the debts of her intestate. These circumstances require an exception to be made to the general rule which forbids an estate or its management to be taken from the hands of those lawfully entrusted with it. For it is equally well settled that where such parties are either in collusion with one holding property alleged to have been fraudulently transferred, or where, as in this case, it is actually claimed by them, or the trustee unreasonably refuses to sue, the creditors or other persons interested may themselves bring an action for, or reclaim the property fraudulently transferred, making the transferees and the trustee parties. (1 Story's Eq. Jur. § 243; *Dewey v. Moyer*, 72 N. Y. 70; *Bate v. Graham*, 11 id. 237; *In re Cornell*, 110 id. 351; *Ft. Stanwix Bk. v. Leggett*, 51 id. 552.) In such a case the creditor stands in the place of the trustee, and it is immaterial that he is not a judgment-creditor. The relation he sustains to the estate entitles him to payment in common and in just proportion with other creditors, and a judgment would give neither lien, property, nor other advantage. Nothing more is sought in this action.

Lichtenberg v. Herdtfelder (103 N. Y. 302), cited by the respondent, was of a different character, and the course suggested by the learned judge who delivered the opinion in that case, is not inconsistent with that adopted in the one at bar. It is unnecessary to say what course would be open if the administrator doubted the justice of the claim presented, or the sufficiency of evidence to overthrow the alleged fraudulent conveyance. In the first case the creditor might not unreasonably be required to establish

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his demands in one of the modes provided by law, and in the other, before involving the estate in litigation, the administrator could require indemnity. Neither question arises here. The complaint was dismissed on the sole ground that the plaintiff was not a judgment-creditor. In this there was error.

The judgment should, therefore, be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

HANNAH COHEN et al., as Administrators, etc., Appellants, v.
THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF
NEW YORK, Respondent.

There is always reasonable ground for apprehending accidents from obstructions in a public highway, and any person who wrongfully places them there or aids in so doing, is responsible for accidents occurring by reason of their presence.

Where a municipal corporation, without the pretense of authority and in direct violation of a statute, assumes to grant to a private individual the right to obstruct one of its streets while in the transaction of his private business, and for such privilege takes compensation, it must be regarded as itself maintaining a nuisance so long as the obstruction is continued by reason of and under the license, and it is liable to damages naturally resulting therefrom to a third person.

M., a grocer, doing business in the city of New York, was in the habit of keeping his grocery wagon, when not in use, standing day and night in the street in front of his store under a permit to do so, granted to him by the city, for which an annual license fee was paid. When so standing the thills were raised perpendicularly and held up by strings. A passing ice wagon struck the grocery wagon and turned it partially around, the strings holding up the thills gave way and they came down upon the sidewalk striking plaintiff's intestate, who was passing thereon, causing his death. In an action to recover damages, *held*, that the license was issued without authority (§ 86, sub. 4, chap. 410, Laws of 1882); that the storing of the wagon in the highway was a public nuisance; that defendant by licensing it made itself liable for any damages resulting therefrom, the same as if it had itself maintained the nuisance; and that, as the accident happened because of the presence of the obstruction, it was the proximate cause of the injury.

Cohen v. Mayor, etc., (48 Hun, 345) reversed.

(Argued April 18, 1889; decided June 4, 1889.)

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APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 22, 1887, which affirmed a judgment in favor of defendant, entered upon a verdict directed by the court.

This action was brought to recover damages for the death of Aschel Cohen, plaintiff's decedent, which occurred by reason of a wound in the head caused by the falling of a pair of thills, attached to a grocer's wagon, upon him while he was walking through one of the streets of the city of New York.

Evidence was given on the trial tending to prove the following facts: On the morning of October 20, 1879, said Cohen was walking through Attorney street in such city, and at the same time an ice wagon was passing south through that street, and a wagon loaded with coals was coming north through the same street. A grocery wagon without any horse attached was standing in front of the grocery store kept by one Marks, who owned the wagon. The thills were tied up in a perpendicular manner with some kind of string, and the length of the wagon was parallel with the length of the street. For some reason the driver of the ice wagon started up his horses, seemingly for the purpose of passing the grocery wagon before the driver of the coal wagon should reach it. The street was narrow and the ice man's wagon caught in some way against the wheel of the grocery wagon, and turned the wagon somewhat around, so that the thills came down on the sidewalk. At that time Cohen was passing and the iron on one of the thills struck him on the head and knocked him down, inflicting an injury upon him from the effect of which he died the same day. The string with which the thills were fastened was a thin, common string, and they had been tied up that way for several months, but whether with the identical string used on the occasion when the accident occurred the witness could not say. The wagon was used by its owner, the grocer, as the evidence tended to show, for the purpose of facilitating the transaction of his private business, and it was in no sense a public cart. When not in actual use the wagon was kept in the street in front of the owner's grocery store, day and night,

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under a permit which was granted by defendant in consideration of the payment by the owner of two dollars therefor. No law or ordinance existed which gave jurisdiction to the defendant, through its Common Council, or through any of its officers, to license or permit such a use of the highway. Upon this evidence as to the manner in which the accident occurred, the court directed the jury to find a verdict for the defendant, and the plaintiff duly excepted to such direction. The direction was given by the court below on the ground that the cause of the injury was the defective manner in which the thills were tied, and there was no evidence of any notice to the city as to that fact.

Francis B. Chedsey for appellants. The storage of the wagon in the public street was unlawful and created a public nuisance notwithstanding the license issued by the city. (Laws of 1873, chap. 335, § 17, sub. 4; *People ex rel. O'Reilly v. Mayor, etc.*, 59 How. Pr. 277; *Ely v. Campbell*, Id. 333; *Cohen v. Mayor, etc.*, 33 id. 404; *Lavery v. Hannigan*, 52 Supr. Ct. 463.) The defendant having given the permit under which the wagon was stored in the public street, receiving compensation for its storage there, became a party with Marks to the unlawful act of keeping it in the street, and with him responsible for the injury caused by its being there, independent of any question of negligence in the manner in which it was kept or notice to the defendant of its dangerous condition. (*Irvine v. Wood*, 51 N. Y. 228; *Clifford v. Dam*, 81 id. 56; *Sexton v. Zett*, 14 id. 432; *Creed v. Hartman*, 29 id. 591; *Congreve v. Smith*, 18 id. 82; *Hume v. Mayor, etc.*, 47 id. 639; *Masterson v. Mt. Vernon*, 58 id. 391; *Kunz v. City of Troy*, 104 id. 344; *Rehberg v. Mayor, etc.*, 91 id. 137; *Goodfellow v. Mayor, etc.*, 100 id. 18.) The fact that the negligent act of a third person, for which the plaintiffs' intestate was not responsible, contributed or combined, to cause the accident, does not relieve the defendant from liability on account of it, provided the accident would not have happened but for the wrongful act or negligence of the defendant

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(*Kennedy v. Mayor, etc.*, 73 N. Y. 365; *Macaulay v. Mayor, etc.*, 67 id. 602; *Ring v. City of Cohoes*, 77 id. 83; *Kunz v. City of Troy*, 104 id. 344; *Merrit v. Fitzgibbons*, 102 id. 362.) If the obstruction in the street was unlawful, it cannot be claimed that the negligence of the driver of the ice cart was, as a matter of law, the proximate cause of the accident. The primary cause was the unlawful act of the defendant. Mere negligence on the part of the driver of the ice cart would not have necessarily defeated a claim by him for damages against the defendant had he been injured by the accident. (*Irvine v. Wood*, 51 N. Y. 224; *Clifford v. Dam*, 81 id. 52; *Creed v. Hartman*, 29 id. 591.) The death of the plaintiff's intestate, caused by the falling of the shafts of the wagon on him, demonstrates that the wagon was a dangerous obstruction on the street. (*Kunz v. City of Troy*, 104 N. Y. 348.)

Thomas P. Wickes for respondent. The acts of the defendants were too remote to be considered a legal cause of the death of the plaintiff's intestate. (*Ryan v. N. Y. C. R. R. Co.*, 35 N. Y. 210; *People v. Mayor, etc.*, 5 Lans. 524; 53 N. Y. 629; *Sharp v. Powell*, L. R., 7 C. P. 253; *Merrill v. Portland*, 4 Cliff. C. C. 138.)

PECKHAM, J. The storing of the wagon in the highway was a nuisance. The primary use of a highway is for the purpose of permitting the passing and repassing of the public, and it is entitled to the unobstructed and uninterrupted use of the entire width of the highway for that purpose, under temporary exceptions as to deposits for building purposes, and to load and unload wagons, and receive and take away property for or in the interest of the owner of the adjoining premises, which, it is not now necessary to more specifically enumerate. The extent of the right of such exceptional user was before us in the late case of *Callanan v. Gilman* (107 N. Y. 360), and nothing more need be said regarding it here.

It is no answer to the charge of nuisance that, even with the obstruction in the highway, there is still room for two or

more wagons to pass, nor that the obstruction itself is not a fixture. If it be permanently, or even habitually in the highway, it is a nuisance. The highway may be a convenient place for the owner of carriages to keep them in, but the law, looking to the convenience of the greater number, prohibits any such use of the public streets. The old cases said the king's highway is not to be used as a stable yard, and a party cannot eke out the inconvenience of his own premises by taking in the public highway. These general statements are familiar and borne out by the cases cited. (*King v. Russell*, 6 East, 427, decided in May, 1805; *Rex v. Cross*, 3 Camp. 224; *Rex v. Jones*, Id. 230; *People v. Cunningham*, 1 Denio, 524; *Davis v. Mayor, etc.*, 14 N. Y. 506, 524; *Callanan v. Gilman*, *supra*.)

Familiar as the law is on this subject, it is too frequently disregarded or lost sight of. Permits are granted by common councils of cities, or by other bodies, in which the power to grant them for some purposes is reposed, and they are granted for purposes in regard to which the body or board assuming to represent the city has no power whatever, and the permit confers no right upon the party who obtains it. As was said by Lord ELLENBOROUGH in the case of *Rex v. Jones* (*supra*), the law upon the subject is much neglected, and great advantages would arise from a strict, steady application of it. This case is a good example of its neglect. There is no well-founded claim of the existence of a power in the defendant to issue such a license. The defendant refers to sections 10 and 27 of chapter 27 of the ordinance of 1859. The former provides for an assignment by the mayor of a stand where the owner of a duly licensed public cart may let it remain waiting to be employed, and also a stand where it may remain at other times upon certain terms, etc. The latter section refers to a licensed cartman and provides for storing his cart in front of his premises under certain regulations. Neither section has anything to do with a case like this. The legislature has expressly enacted that the city shall have no power to authorize the placing or continuing of any encroachments or obstructions

upon any street or sidewalk, except the temporary occupation thereof during the erection or repair of a building on a lot opposite the highway. (Consolidation Act, § 86, subd. 4, pp. 25, 26; *People ex rel. O'Reilly v. Mayor, etc.*, 59 How. Pr. 277; *Ely, Mayor, etc., v. Campbell, Comr., etc.*, Id. 333; *Lavery v. Hannigan*, 20 J. & S. 463.)

The owner of this wagon was not a cartman, nor was the wagon used as a public cart, but only as a means to enable the grocer to transact his own private business. He acquired no right by virtue of the license to store his wagon in the street, and in doing so he was clearly guilty of maintaining a public nuisance. The defendant was also guilty. It assumed to authorize the erection and continuance of a public nuisance. To be sure the legal power to grant the license to obstruct the street was, by the legislature, withheld from the defendant, yet, nevertheless, it did grant just such a permit and took compensation on account of it. In thus doing, the city became a partner in the erection and continuance of such nuisance. It was a nuisance, not by reason of the manner in which the thills were tied up, but because the wagon was stored in the street. It was not a mere negative attitude which the defendant adopted, such as would have been the case had it simply acquiesced in the manner in which the street was used. In this case it not only acquiesced in such use, but it actually encouraged it by making out and delivering a license to do it, and it received directly and immediately from the owner of the wagon a compensation for the erection and maintenance of a nuisance under the authority of such license. Under such circumstances the defendant must be held liable the same as if it had itself maintained the nuisance, for the owner of the wagon was nothing more than an agent through whom the defendant did this unlawful act. (*Irvine v. Wood*, 51 N. Y. 224.) But assuming that the city had no right to issue the permit, it is urged that such license did not authorize the negligence which caused Cohen's death, and that the act of the defendant was too remote to be regarded as the proximate cause of the

damage herein. We do not think so. The act of the defendant was wrongful, it consisted in setting up an obstruction in the public highway, and the accident happened because of the presence of the obstruction at the point in question. It was there by the act of the defendant, and being there it has caused the injury. To be sure it may be said that if the thills had not been negligently tied, they would not have fallen. But that was simply the way in which, by reason of the presence of the obstruction, the accident occurred. There is always reasonable ground for apprehending accidents from obstructions in a public highway, and any person who wrongfully places them there or aids in so doing, must be held responsible for such accidents as occur by reason of their presence. The obstruction in such case must be regarded, within the meaning of the law on the subject, as the proximate cause of the damage.

We think that in a case like this, where no obstruction would have existed but for the wrongful conduct of defendant, it must be held responsible for the damage which is caused by reason of the obstruction, even though it might not have happened if the licensee had been careful in regard to the manner in which he exercised the assumed right granted him by the license. The defendant, under these circumstances, must take the risk of such care, and not an innocent passer-by. This is not a case for the application of the doctrine that where the injury results from the negligent mode in which the licensee exercises the privilege granted to him, which mode is not part of the license, there must be proof of negligence showing permission to use, or acquiescence in the use of the mode after notice or knowledge on the part of the licensor. That may be the rule where the thing licensed is legal because of the license, and the illegality consists in the manner in which the license is carried out. The difficulty here does not alone consist in the negligent manner of fastening up the thills; but the license itself, the permission, with or without a consideration, to obstruct the street at all for any such purpose as was the case here, is the

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wrongful act on the part of the defendant which renders it responsible for the damage naturally sustained from such obstruction.

We do not say that this principle of responsibility would render the city liable in every case of a mistaken exercise of power authorizing the use or occupancy of a public street by an individual. We confine ourselves to the decision of this case, and we simply say that when the city, without the pretense of authority, and in direct violation of a statute, assumes to grant to a private individual the right to obstruct the public highway while in the transaction of his private business, and for such privilege takes compensation, it must be regarded as itself maintaining a nuisance so long as the obstruction is continued by reason of and under such license, and it must be liable for all damages which may naturally result to a third party who is injured in his person or his property by reason or in consequence of the placing of such obstruction in the highway. This is none too severe a liability. It is to be hoped that its enforcement will tend to the discontinuance of a custom of granting permits or licenses to do what it is well known the city has no right to authorize or license. Such licenses, it is matter of public notoriety, are constantly granted without any semblance of legal authority, and the licensees are continually acting under them and obstructing the public streets to the serious inconvenience and danger of the public. When it is understood that such license has not only no effect in the way of legalizing an obstruction, but that it simply makes the city a partner in the maintenance of a public nuisance, and liable for the damage caused thereby, such knowledge may, perhaps, restrain the utterly illegal practice, and tend in some degree to the protection of the public in the lawful use of its own highways.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except GRAY, J., dissenting on the ground that, assuming the city could not legally grant a license to Marks to keep his wagon in the street, that fact, in this case, was not

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sufficient to charge the city with liability for the occurrence complained of. The proximate or immediate cause of the injury to the plaintiff's intestate was the negligent act of others. Judgment reversed.

DENNIS BUCKLEY, JR., by Guardian, etc., Respondent, v. THE GUTTA PERCHA AND RUBBER MANUFACTURING COMPANY, Appellant.

The simple fact that a machine is dangerous does not make an employer liable for an injury received by a minor employed in operating it.

Where the minor is familiar with the machine, and its character and operation are obvious, and he is aware of and fully appreciates the danger to be apprehended from working it, he takes upon himself the risks incident to the employment the same as a person of mature age.

Plaintiff, a boy about twelve years of age, was employed in helping to operate a machine in defendant's factory. He had been in such employ about three days when, in attempting to put a cylinder in place, his foot slipped, he threw out his hand to save himself from falling and thrust it into the cogs of some revolving wheels about nine inches from the end of the cylinder, and the hand was crushed. *Held*, that an action to recover damages for the injury was not maintainable; that as the danger was apparent, and as the injury was occasioned solely by the accidental slipping, the fact that plaintiff had not been warned as to such danger was immaterial.

Buckley v. G. P. & R. Mfg. Co. (41 Hun, 450) reversed.

(Argued April 24, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 23, 1886, which affirmed a judgment in favor of plaintiff entered upon a verdict.

This action was brought to recover damages for injuries received by plaintiff through the alleged negligence of defendant.

The facts are sufficiently stated in the opinion.

Jesse Johnson for appellant. This being an inevitable accident, defendant was not liable. (*Hickey v. Taaffe*, 105 N. Y. 26; *Kelly v. S. B. R. R. Co.*, 109 id. 44.) The directions which O'Rourke gave the boy as to putting the shell in were

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the act of a fellow-workman, for which the defendant was not responsible. (*Weber v. Piper*, 109 N. Y. 496; *Salisbury v. Howe*, 87 id. 128, 132; *Storrs v. Flint*, 46 Super. Ct. 498.) The verdict cannot stand on the ground that the defendant failed to give plaintiff proper instructions. (*Hickey v. Taaffe*, 105 N. Y. 38; *Scott v. Sheppard*, 2 Smith's L. C. [8th ed.] 800; *Carter v. Towne*, 103 Mass. 507; Whart. on Neg. note 137, § 143; *Thomas v. Winchester*, Bigelow's L. C. 609; *Davidson v. Nichols*, 11 Allen, 514; *Ryan v. N. Y. C. R. R. Co.*, 35 N. Y. 210; *Kerrigan v. Hart*, 40 Hun, 390; *Jaffe v. Harteau*, 56 N. Y. 398.) The boy was not free from contributory negligence. (*Wendell v. N. Y. C. & H. R. R. Co.*, 91 N. Y. 420.)

James Troy for respondent. In the case of a child of tender years where the circumstances would justify an inference that he was misled or confused in respect to the actual situation, and that his conduct was not unreasonable, in view of those circumstances and his age, the question of contributory negligence is for the jury, although he may have omitted some precaution, which, in the case of an adult, would be deemed conclusive evidence of negligence. (*Barry v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 289.)

EARL, J. At the time the plaintiff was injured he was about twelve years old. In July 1882, he applied to the defendant for employment, and its foreman took him to O'Rorke, who had charge of one of its machines, and told the boy to do whatever O'Rorke directed him. The business of the defendant was to coat cloth with rubber, and for that purpose it had a number of machines, in a large room, operated by steam. The machines were simple, and whatever danger there was in their operation was obvious. It is difficult to describe them without a photograph or model, and we will not attempt to do it.

The plaintiff was put at work on Saturday about noon and worked that day and Monday and Tuesday until eleven o'clock, when he was injured. During that time he had seen the

machine operated and had worked about it and became as familiar with it as a boy of that age could. It became necessary from time to time to remove from the front of the machine a wooden cylinder, through which a square iron rod ran, and carry it to the back of the machine, and take a similar cylinder from that place and put it in front of the machine in place of the one removed. He had seen this cylinder in front of the machine removed several times and had himself assisted in removing it several times, so that he understood perfectly the process. When that cylinder was wound full of the rubber cloth, it was usually removed by O'Rorke and a young man by the name of Brevort, each taking one end and carrying it around to the rear, behind the machine, and then an empty cylinder was taken from the rear to the front and there it was put in position; and this had been done several times by the plaintiff and Brevort, each taking one end. On this occasion, after O'Rorke and Brevort had taken the cylinder from the front to the rear, O'Rorke rolled an empty cylinder under the machine to the front where the plaintiff was standing, and, as the plaintiff testified, told him to put it in place. It weighed about one hundred pounds. He succeeded in putting it in place and drew a band over the end to hold it in the slot into which the end had been dropped, and was endeavoring to turn a screw into the band for the purpose of keeping it in position, and he turned the screw in the wrong direction and it came out and rolled upon the floor. He picked it up and came back with it and put the end of the screw in and started it, and then his foot slipped and he threw out his hand to save himself from falling and thrust it into the cogs of some wheels about nine inches from the end of the cylinder, and his hand was crushed.

O'Rorke testified that he did not instruct the plaintiff to pick up the cylinder and put it in. On previous occasions the plaintiff and Brevort, acting together, had put in the cylinder, he taking one end and Brevort the other. The plaintiff had not been instructed with reference to the machinery and had not been cautioned regarding any danger.

At the close of the evidence the court ruled that O'Rorke was a fellow-servant of the plaintiff, and also charged the jury that no act of negligence on the part of O'Rorke could be imputed to the defendant, because he was the plaintiff's fellow-workman. This case must, therefore, be treated on this appeal as if O'Rorke had not told the plaintiff to take up the cylinder and put it into its place, and as if the plaintiff had voluntarily, without any instruction, picked it up, put it in its place and attempted to fasten it so as to keep it there.

It is impossible to perceive, from the evidence, what the defendant could have done to avoid the accident. The machine was not imminently dangerous. The hands of the plaintiff, in anything which he had to do or was doing about the machine, would not come within nine inches of the cogs where he was injured. It was not needful to instruct him that the cogs were dangerous, because that was obvious. He could see as well as anybody that if his fingers got into the cogs they would be crushed into pieces. He was not injured because he did not know that the cogs were dangerous, but the injury happened because he slipped and fell and instinctively threw out his hand to recover himself. His falling was a mere accident, and no amount of instruction or caution from the agents of the defendant would have prevented the accident and saved him from the injury. His injury did not come from any ignorance of the machines or of the danger to which he was exposed, but it came solely from the accident.

The judge charged the jury that in order to find a verdict for the plaintiff, they "must find that the employer was guilty of breach of duty towards this young man; in other words, that he failed to do what a prudent man would have done under the circumstances in the management of this business. * * * Of course, if a full grown man had been employed at this work he would know that if he placed his fingers between the revolving cogs he would be very apt to be injured, and you are to say whether this boy would know as much as a man on that subject." It is idle to say that this plaintiff did not know as well as a grown man that if he placed his fingers between the revolving

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cogs he would be injured. The judge further charged: "If you shall say, under this proof, that it was not a dangerous machine to put such a boy at work upon, that ends the case, because that is the foundation of the plaintiff's case, that he was put to work at a dangerous machine without being properly instructed as to the liability or risk which he ran of injury." It is impossible to perceive how the absence of instructions had anything to do with this injury. He had been sufficiently instructed by what he saw during the time he had been employed there. He had seen the machine operated and had worked about it. He had seen this cylinder removed by others, and had himself assisted in removing it. What further knowledge could have been given him by instructions it is impossible to discern. The judge further said: "You observe that at one end of that machine the parts are stationary, and the danger, if any, is at the other end where the larger wheel and revolving cogs are situated, and, of course, that is the place of danger, if any; and if it is dangerous at that point, my opinion is that the danger is apparent, and that there is no hidden danger or defect in it. That is my view, but, of course, you are not to be governed by my view of the facts." The view the learned judge took of the facts should have induced him to nonsuit the plaintiff. The danger was apparent. The plaintiff had nothing to do with the cog wheels. He had no occasion to touch or handle them, and, but for the accident of his slipping, his hand would not have touched them.

The judge further charged: "Now, was there anything that this boy needed instruction about in connection with that machine? If you shall say, considering his age, capacity and experience, that it was necessary for his employer to warn him not to put his fingers in between the cogs, and that if he did so he would be injured, and if the employer failed to do that, that it would be a specific act of negligence for which he would be liable." We think it is preposterous to say that it was the duty of the employer to warn him not to put his fingers in between the cogs. It might as well be required to warn a boy twelve years old, who was working about boiling water or a hot fire,

not to put his hand into the water or the fire. The judge further charged the jury, "If you come to the conclusion, from this testimony, that this was an ordinary safe machine, and that a person putting a boy at work upon it omitted no precaution which a prudent man would have taken under the circumstances, then there would have been no breach of duty on the part of the defendant, and that ends the case for the plaintiff. If you find that this was a dangerous machine, and that a prudent man would have told this boy to keep his hands from these revolving wheels, then that would be an act of negligence for which the employe could be held responsible." Here again the case is made to turn upon the necessity of instructions to this boy to keep his hands from the revolving wheels, in the face of the fact that he did not thrust his hand voluntarily into the revolving wheels, but that his hand went into them in consequence of sheer accident.

He further charged the jury as follows: "The whole case in every view turns upon the question, whether or not a jury of twelve men shall determine, as a matter of fact, from this evidence, that this was a dangerous machine, and whether it was negligence to set such a boy to work on it. If you so find, the defendant is liable, otherwise the defendant is entitled to a general verdict." There is no rule of law that a minor may not be employed about a dangerous machine, and the simple fact that a machine is dangerous does not make an employer liable for an injury received by a minor employed upon such machine. All the law requires is that the minor should be properly instructed as to the danger to which he is exposed, and if he is injured because he has not received such instruction, then, as a general rule, the employer may be held responsible. But where the minor is familiar with the machine, and its character and operation are obvious, and he is aware of and fully appreciates the danger to be apprehended from working the machine, the fact that he is a minor does not alter the general rule that the employe takes upon himself the risks which are patent and incident to the employment.

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(*Hickey v. Taaffe*, 105 N. Y. 26.) In that case Judge PECKHAM said: "She had not, it is true, received any instructions as to its dangers from the defendant or his agents, as she says, but she had acquired the information, in fact, from the best of all teachers, that of practical experience. She knew, therefore, all that the instructions of the defendant would have imparted to her. This was enough. Being of an age to appreciate, and having full knowledge of the danger, and at the same time being competent to perform the duty demanded from her, the fact that she was a minor does not alter the general rule of law upon the subject of employes taking upon themselves the risks which are patent and incident to the employment." In that case the plaintiff was a young girl about fourteen years old. Here the plaintiff knew all about this machine and its operation and danger that any instructions could have given him, and we repeat that no instructions, however minute, would have avoided the accident which occurred.

After the general charge of the judge to the jury, the counsel for the defendant said this to him: "I understand your honor to tell the jury, and you did tell the jury, and I ask to have it repeated, that if it happened from a slip and was an inevitable accident, that there can be no recovery any way, whether it was a dangerous employment or not." And the judge replied, "I think I have charged that substantially; I cannot repeat it." That charge required a verdict for the defendant. The evidence is undisputed, all coming from the plaintiff himself, that the accident did happen from a slip, and was, therefore, in that sense, inevitable.

We are, therefore, of opinion, as this case now appears in the record, the trial judge having held as the law of the case, that the defendant was not responsible for any carelessness on the part of O'Rorke, that the plaintiff should have been nonsuited.

The judgment should, therefore, be reversed and a new trial granted, costs to abide event.

FINCH, PECKHAM and GRAY, JJ., concur; DANFORTH, J., concurs on the sole ground stated in the last exception to the judge's

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charge, viz., if this was the result of an accident, the plaintiff could not recover; to the rest of the opinion he dissents.

ANDREWS, J., does not vote; RUGER, Ch. J., absent.

Judgment reversed.

In the Matter of the Accounting of NATHANIEL NILES, as
Administrator, etc.

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S. died in 1873 intestate, leaving him surviving a widow and a daughter, E., his only child and next of kin. The widow being deemed incompetent, on petition of E. letters of administration were issued to her and one N. They soon after made up between themselves an inventory, but none was filed until 1882. Most of the estate consisted of mortgages on real estate. E. allowed N. to have control of the assets, and as moneys were realized thereon, he loaned them on bonds and mortgages which were taken in E.'s name, individually. Other moneys were deposited in her name and were drawn upon by her as required. In 1882 N. failed, and thereupon E. took possession of the securities, and proceedings were instituted for an accounting by N. Upon the accounting N. credited himself with the investments so made on bonds and mortgages as payments to and for the use of E. The surrogate rejected this claim, and in his decree charged N. with the moneys represented by the securities, and required him to pay over to E., as next of kin, her distributive share thereof, and upon his complying with the decree required E. to transfer to him said securities. *Held*, error; that, conceding E. could refuse to accept or be bound by the securities as payments, she could not retain them, and at the same time claim that the items in the account representing them should be disallowed, but should have been required to transfer them to N. as a condition precedent to his being charged with the amounts; but, *held*, that assuming the investments were irregular and constituted breaches of trust, in the absence of proof of fraud or misrepresentations, just so far as E. had the means of knowing of her co-administrator's acts and assented to or acquiesced in them, either expressly or by her passiveness, she was bound and was estopped from objecting thereto.

Also, *held*, that it was immaterial whether N. treated the investments when made as for the estate or as payments to E.; that she being co-administratrix as well as beneficiary, and the widow's rights not being affected, was bound in either case; that she could not stand by and see an improper use made of the assets and thereafter claim immunity in her official, or advantage in her private, capacity.

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The administration of assets of the estate of a decedent is peculiarly within the cognizance of equity, and a Surrogate's Court, in adjusting the accounts of executors or administrators, is governed by principles of equity as well as of law; it is not prevented by any rule of law from doing exact justice to the parties, according to the equities, within the confines only of statutory provisions.

He who holds a position of trust jointly with others cannot remain passive, when he knows of irregular acts of his associates, without incurring responsibility for such acts.

(Argued March 12, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made April 3, 1888, which affirmed a decree of the surrogate of the county of Kings on settlement of the accounts of Nathaniel Niles, as administrator of the estate of Chauncey S. Stevens, deceased.

The intestate, Stevens, died in June, 1873, leaving him surviving a widow and a daughter, Elizabeth S. Miller, an only child. The widow appears to have been subject to fits or aberration of mind and was deemed incompetent for the transaction of business. Therefore, his daughter, joining with her one Nathaniel Niles, a lawyer, and an old friend of the family, applied for and obtained to themselves the grant of letters of administration. For reasons satisfactory to themselves, and apparently based on a desire that the widow should not know of the amount of the estate, because of her impaired mental condition, the administrators filed no inventory until 1882; but, not long after the death of the intestate, they made up between themselves, in August, 1873, an inventory and appraisal of the personal estate, which each signed. Most of the estate coming under their administration consisted of mortgages upon real estate. Mrs. Miller allowed her co-administrator Niles to have the custody of the assets of the estate and deferred to his management of the affairs, until he failed in a banking business in which he had been engaged. Then she obtained the possession of the assets and excluded him from connection therewith. During his manage-

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ment, as moneys were realized upon the assets, Niles loaned them out upon bonds and mortgages, and the securities, representing the investments, were taken in Mrs. Miller's name, individually. Other moneys were deposited at a banker's to her credit, against which she drew when she required funds for herself or to give to her mother. It does not appear that any accounting and distribution were desired, until Niles' failure in 1882, when Mrs. Miller, the daughter, and her mother united in a petition to the surrogate for an order compelling him to account. Thereupon he instituted a proceeding for a judicial settlement of his accounts and the surrogate consolidated the two matters into the present proceeding. To Niles' account the widow and daughter (his co-administratrix) filed objections and the matter was referred to a referee. They contested various items in his account, but the contest finally resolved itself into a dispute over items of investments of the estate moneys, with which Niles credited himself as payments to or for the use of Mrs. E. S. Miller. The investments so objected to were loans upon the bonds and mortgages taken in Mrs. Miller's name. The referee reported against Niles, holding, as a conclusion of law, that these items were not payments to Mrs. Miller on account of her distributive share of the estate, but were investments of estate moneys made by Niles, which should be disallowed and himself charged with the sums represented thereby, with interest on each item from the date of the alleged payment. The decree confirmed the report in such respect, and a provision was made therein that Niles should pay over to the widow her distributive share of the balance, as stated, and to the daughter, Mrs. Miller, as next of kin, her distributive share thereof. Mrs. Miller had been and was in possession of the investment securities and moneys proceeding therefrom, but the decree required Niles, notwithstanding, to make the payments called for by the decree, and upon his complying, then only was she to transfer over to him all the securities standing in her name, and moneys representing the investments or payments mentioned in the referee's report as being disallowed.

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Nathaniel C. Moak and *Marston Niles* for appellant. In her twofold character of administratrix and next of kin, Mrs. Miller was, by her participation and acquiescence in the acts of Mr. Niles, so far bound that she cannot now repudiate these investments made with her knowledge and consent. (*Maccumbin v. Cromwell*, 7 G. & J. 157; *Willis on Trustees*, 10 Law Lib. 92.) If Mrs. Miller, the co-administratrix, directed, assented to or acquiesced in the investments made by appellant, she was bound by such investments so far as her share of her father's estate was concerned, and to the extent of her share, at least, she was bound to accept such investments. (*Lewin on Trusts* [6th ed.] 744, 745; *Raynes v. Raynes*, 54 N. H. 202, 210, 212; *Perkins v. Hammil*, 30 N. J. Eq. 557; *Birks v. Mickelthwaite*, 33 Beav. 409; *Belknap v. Belknap*, 5 Allen, 468.) Mrs. Miller is bound because of concurrence in the investments. (*Ryder v. Bickerton*, 1 Eden, 149, note; 3 Swanst. 80; *Walker v. Symonds*, Id. 54; *Wilkinson v. Parry*, 4 Russ. 272; *Cocker v. Quayle*, 1 Russ. & M. 535; *Nail v. Printer*, 5 Sim. 555; *Booth v. Booth*, 1 Beav. 125; *Langford v. Gascoyne*, 11 Ves. 336; *Smith v. French*, 2 Atk. 243; *White v. White*, 5 Ves. 555; *Trafford v. Boehm*, 3 Atk. 444; *Byrchoild v. Bradford*, 6 Mad. 13; *Baker v. Carter*, 1 Y. & C. 255; *Underwood v. Stevens*, 1 Mer. 712; *Brice v. Stokes*, 11 Ves. 325, 326.) So far as her interest as next of kin is concerned, the rule applicable to co-trustees must be applied against herself as a trustee in the same way in which the law would apply it in favor of a third person against her as a trustee. (*Perry on Trusts* [2d ed.] § 418; *Hamburg v. Kirkland*, 3 Sim. 235; *Broadhurst v. Balgny*, Young, 1; *Thompson v. Beach*, 22 Beav. 326; *Williams v. Nixon*, 2 id. 475; *Booth v. Booth*, 1 id. 125; *Dix v. Burford*, 19 id. 409; *Clark v. Clark*, 8 Paige, 153; *Mayne v. Griswold*, 3 Sandf. 463, 474.) If the conduct of Mrs. Miller be treated as acquiescence, the result is the same. (*Kent v. Jackson*, 14 Beav. 367; *Styles v. Grey*, 1 M. & G. 422; *Ex parte Morgan*, 1 H. & T. 327; *Graham v. Birkenhead R. Co.*, 2 MacN. & G. 146; 2 *Perry on Trusts*, § 870; *Lewin on Trusts*, 737;

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Thompson v. Finch, 22 Beav. 316; *Johnson v. Corbett*, 11 Paige, 266; *Weetjin v. Vibbard*, 5 Hun, 265, 267; *Wilmerding v. McKesson*, 103 N. Y. 329; *Croft v. Williams*, 84 id. 384, 388; *In re Brown*, 16 Abb. Pr. [N. S.] 457; *Monell v. Monell*, 5 Johns. Ch. 283; *Sutherland v. Brush*, 7 id. 22.) Where there are two trustees it is the duty of each to see that the property is duly secured or properly applied. (Smith's Man. of Eq. 195; Story's Eq. par. 110 a, 1281, note, 1284 n; 2 Spence, 310 n. 920, 934; *Correll v. Gatcombe*, 27 Beav. 568; *Griffiths v. Porter*, 25 id. 236.) The liability of joint administrators and co-executors is identical. (Lewin on Trusts [5th Eng. ed.] 222, *post*, 1836, note i, 1.) The defendant who is called to account, if held chargeable, should be afforded his remedies against his co-trustees and any third persons who have been accessory. (*Sherman v. Parish*, 53 N. Y. 483.) If an administrator purchases property in his own name with money belonging to the estate, a trust will result to legatees or other persons. (Perry on Trusts, § 127.) The fund may be followed so long as it can be identified. (Perry on Trusts, §§ 128, 130, 669; *Clive v. Caro*, 1 J. & H. 139; Lewin on Trusts, chap. 3, § 3, pp. 911, 912.) The court of probate in taking the account will act on equitable principles, that is, will act as a court of equity, not as a court of law. (Perry on Trusts, § 407; *Cross v. Smith*, 7 East, 246; *Jones v. Lewis*, 2 Ves. 241; *Poole v. Munday*, 103 Mass. 174; *Upson v. Badeau*, 3 Bradf. Sur. 13.) If the *cestui que trust* be one of the trustees, and did join with the co-trustees in a breach of trust, and the co-trustees have been made to repair the breach, the co-trustees have a lien on the share of the *cestui que trust*, who is also a trustee, for contribution. (Lewin on Trusts, chap. 3, §§ 911, 912; Id. chap. 13, p. 273.) Good faith cannot be asserted by one who aids in the diversion of a known trust fund from its lawful owner. (*Garner v. Germania Life Ins. Co.*, 110 N. Y. 266; *State v. Worthingham*, 23 Minn. 529, 531.) Mrs. Miller will not be permitted to take advantage of her wrong, or to claim for her act a construction which would make it to be a wrongful act. (*Blount v. Robeson*, 3 Jones' Eq. [N. C.] 73.)

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Charles Lyons, Jr., and *Merritt E. Sawyer* for respondents. Assuming the investments were made with the moneys of the estate and were not payments to Mrs. Miller, she is not estopped from setting up any breach of trust, unless, understanding all the facts and circumstances, she voluntarily concurred and acquiesced in the acts of which she now complains. (*Whistler v. Newnean*, 4 Ves. 129; *Hughes v. Wells*, 9 Hare, 773; *Lloyd v. Atwood*, 3 De G. & J. 615; *Adair v. Brimmer*, 74 N. Y. 554; 2 Lewin on Trusts, 923, 926, 927; *Bucheridge v. Glasse*, Cr. & Ph. 135; *Thompson v. Finch*, 22 Beav. 325, 327; 6 De G., M. & G. 560; *Life Assn. of Scotland v. Siddal*, 3 De G., F. & I. 73; *Cockerell v. Chalmeley*, 1 R. & M. 425; 1 Lewin on Trusts, 498; *Carpenter v. Heriat*, 1 Eden, 338; *Morse v. Royal*, 12 Ves. 373; *Murray v. Palmer*, 2 S. & L. 486.) An administrator can only be held liable for the *devastavit* of his co-administrator, where, having knowledge of the misapplication or waste, he assents thereto or neglects some duty consequent upon his knowledge of such misapplication or waste. (*Wilmerding v. McKesson*, 103 N. Y. 332; *Croft v. Williams*, 88 id. 388; *In re Hall*, 5 Duer, 42.) A party's motives, reasons or mental operations are not in question. It is the fact only that is to be looked for. (*Champion v. Joselyn*, 44 N. Y. 657.) Declarations of a party are evidence against him, but can never be used in his own favor. (*Sweeting v. Turner*, 10 Johns. 216.) The appellant's exceptions to the refusal of the surrogate to make a separate decision and findings in addition to the decision and findings made by the referee, who was appointed to hear and determine all things, are not open to review in this court. (Code Civ. Pro. §§ 994, 997, 1337, 2545, 2546, 2576.)

GRAY, J. After a careful examination of the voluminous and somewhat diffuse record and briefs, we are led to the conclusion that this appeal must succeed. The proceedings in the Surrogate's Court, and the decision which closed them were without any apparent regard to certain well-established

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equitable principles; to the recognition and protection of which every person is entitled, while accounting in that court for his acts as executor or administrator. The appellant, Niles, raises no question as to his responsibility towards the widow. The issue is between him and his co-administratrix, Mrs. Miller, who is also the next of kin of the intestate. And the question is whether she is in a position to hold her co-administrator, Niles, to a full liability for the consequences of improper dealings with the assets of the estate. Can she divest herself of all responsibility for the consequences of his acts and, either in her capacity as co-administratrix, or, in her capacity as beneficiary, can she charge him with every act claimed to be a breach of trust, and with consequent losses? This question is not complicated by her dual capacity; rather, it is simplified; because the elements of concurrence, of knowledge, or of acquiescence, in the individual, are equally available to the administrator, Niles, as weaknesses in either position, which she may take in her attack upon him.

Before passing to the consideration of the question thus suggested, we observe, with respect to the decree of the surrogate, that it contains a provision which we hold to be highly inequitable and harsh. It is contained in the concluding clause, and by it Niles is required to raise and pay over to Mrs. Miller the sum found due her as her distributive share of the estate, before she is to transfer to him the securities and moneys forming part of the estate, and which she had obtained and continued to retain possession of. Niles was accounting as an administrator. The theory of such accounting is the statement of what he received as the estate of the intestate; of his acts with respect to the assets in his hands and of a balance on hand for distribution. Disregarding, for the present, all questions as to the regularity of the investments of moneys made by him when he accounted, his balance was arrived at by stating, as credits to himself, those investments as payments to Mrs. Miller, as next of kin. They were wholly disallowed as credits, upon her objection. If she refused to accept, or to be bound by them, the

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decree should make some allowance for them. She could not retain possession of them and, at the same time, claim that the items in the account, which they represented, should be disallowed and that the administrator should be compelled to pay over to her her share of the stated balance. That would be a most inequitable mode of proceeding. The parties interested in the administration of an estate are not entitled to any such species of security for its performance as that, or to any other than the bond which has been given. The administrator is either entitled to some credit for the securities, in which he has placed the moneys of the estate, and which he has delivered to the beneficiary; or, if he is not, and the securities are not accepted or recognized by the beneficiary, then he should have back all that the beneficiary may have received and now objects to his being credited with. It seems too plain for discussion that, if no credit whatever is given to the administrator for his investments, then he is entitled to be placed in his former position with regard to the estate and, consequently, to have the possession of all assets in the beneficiary's hands. He should have them, if for no other reason, in order to fulfill the requirements of the decree. It is easily imagined how it might happen that the administrator, if possessed of no individual resources, would be rendered incapable of making payment under such a decree. He might have acted in good faith, but mistakenly as to the law of his duties; and, being called upon to replace the moneys, represented by investments disallowed as improper, finds himself without the possession of the securities, but yet required, in some way, to make the payment. There is something in this which shocks the legal as well as the moral sense.

Without dwelling further on this objectionable feature of the decree, we come to the main question of the case. For the unusual delay in distributing the estate, continuing over some nine years, we are furnished with a probably good reason, in the fact of the recurring periods of insanity of the widow. The desire of the daughter to avoid any publicity of her mother's condition and the mother's unfitness to be entrusted

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with the possession of her share of the estate, operated as causes for continuing the administration of the estate so long. However it may have been, no objection seems to have been raised, until the administrator Niles fell into his financial difficulties; when his co-administratrix assumed, and excluded him from, the control and direction of affairs. During the course of the administration, up to this moment, Niles had undertaken to make dispositions of the funds of the estate by ways of loans and investments. There is no doubt but what Mrs. Miller reposed the utmost confidence in him and relied upon his ability and honesty. That follows from her selecting him to act with her in the administration; from her entrusting him, from the beginning, with the custody of the assets, and from her permitting him to make investments. It is with respect to the investments, which he made with the estate moneys, that Mrs. Miller now insists that they constituted breaches of trust on his part, for which he solely is answerable.

Assuming that the investments were irregular and improper acts, and did constitute breaches of trust, the question, nevertheless, suggests itself as to whether Mrs. Miller is so dissociated from their commission, as to be able to shift from her own shoulders all responsibility for what has occurred. It may be proved that the administrator, in some instances, has acted wrongly, and that he has abused the confidence imposed in him, so as to deceive and mislead the judgment of his co-administratrix. We do not say that he has not done so, or that it might not be shown that he has deceived her. But, taking the record before us, there is no finding that any fraud was committed or deception practiced by Niles. Therefore, we are not satisfied that any basis has been laid for holding him solely and exclusively liable for the consequences to the estate of his acts. The referee found that the loans were made without Mrs. Miller's knowledge, except in one instance; but he also found that the securities in question were all taken in her name. He further found as follows, viz.: "That when informed that investments were taken in her name, she was told by Niles that they were so taken on account of her

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mother's mental condition, for convenience * * * and understood that they were investments of the estate." This finding involves, it will be seen, the fact of knowledge having been, at some time, communicated to Mrs. Miller with respect to investments. At this point it may be observed that, whether Niles treated the investments in question, at the time, as made for the estate of the intestate, and whether he is now entitled to treat them as payments to Mrs. Miller, as beneficiary, does not seem to be very material as a question. As she was co-administratrix as well as beneficiary, and the widow's rights are conceded and not affected, finding one way or the other would not affect the questions presented to us by these two parties. The referee found expressly that there was information furnished to Mrs. Miller by Niles, concerning the investments, upon her request for such, and independently ; but he denied numerous requests, presented on the appellant's part, for findings as to authority from Mrs. Miller to make the investments, and as to her assent or ratification with respect thereto, as to her knowledge thereof and the absence of objection thereto.

Unquestionably there is ample evidence in the case to establish, if not Mrs. Miller's concurrence, her assent in many, if not in all, instances ; but such a fact seems to have had no influence upon the referee's mind in passing upon the case, and, evidently, was considered immaterial as affecting her rights. The theory upon which he proceeded, and upon which the courts acted in confirming his decision, utterly ignored the effect upon the rights of the contestants of her assent to, or acquiescence in, the acts of the administrator. This matter of the administration of assets is one which is peculiarly within the cognizance of equity, and a Surrogate's Court, in adjusting the accounts of executors and administrators, is governed by principles of equity as well as of law. (*Upson v. Badeau*, 3 Bradf. 15.) In the exercise of the statutory powers, conferred upon him to direct and control the conduct and settle the accounts of administrators and executors, the surrogate is not fettered ; nor is he prevented by any rule of law from doing exact justice to the

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parties. He is supposed to administer justice in each case within his jurisdiction, according as the equities of the case demand; within the confines only of statutory provisions. Now, what was Mrs. Miller's position in the case? She was co-administratrix and, at the same time, the next of kin and prospective distributee of two-thirds of the estate. Niles was joined with her to aid her in the office, which she could have filled alone. Except that she chose to leave the custody and management of the affairs of the estate to her co-administrator, she was, at all times, a factor in the administration, and legally chargeable with what was done therein; in the absence of any fraudulent practices of deception or concealment upon her by her co-administrator. She had frequent consultations with him and, at various times, sought and obtained information as to the affairs of the estate. There is no evidence that she was in any sense excluded from the administration by Niles. She relied upon his judgment, and, by her own testimony, we are informed that she "never failed, whenever he told her anything about investments, to assent to it." At another time she says "I did not object to any one of these investments when I heard of it." There is enough in this record to show that, if not in all instances, in many, she knew of the investments which were made by her co-administrator, and if she did not concur, either she assented, or, by raising no objection, acquiesced. Her attempt to distinguish between authorizing or directing an act of the other administrator, and assenting to it when done, is quite futile and ineffectual for any purpose here. Upon her, equally with her associate in the office of administration, rested the duty to be vigilant to guard the estate from waste, loss and impairment. Having sought the office, while she remained in it, she could not stand by and see an improper use made of the assets, and thereafter claim immunity in her official capacity, or advantage in her private capacity; whether such claim should be grounded upon ignorance of her legal duties and rights, or upon her mistaken reliance upon her associate in office. We hold this, with the proviso that if she can show that he deceived her and purposely concealed the

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facts from her, which were requisite to a fair understanding of a transaction, she is not bound by it.

From what appears, we may assume that Niles acted generally upon his own ideas, and, possibly, often with some selfish or interested end in view. But to his taking the initiative in action, she never appears to have objected, if she did not actually prefer it; depending, as the evidence shows she did, upon his judgment. As to subserving his own ends, as he certainly seems to have done in some instances, by the employment of the funds of the estate, if she chose to consent, or, with knowledge, failed to object to it, she cannot be heard to complain of the consequences. Having entered upon the office, she was bound to perform its duties; and mere passiveness will not furnish an adequate excuse, or any ground for relief in equity for the consequences of administrative acts by her co-administrator. She could not rely upon him to manage affairs and then claim to have been relieved from the performance of her legal duty. He who fills a position of trust conjointly with others cannot remain passive, when he knows of irregular acts by his associates, without coming equally under the judgment of the law for the consequences. Mrs. Miller was bound to inform herself with respect to the affairs of the estate and to inquire as to the use which was made of its assets. (1 Perry on Trusts, §§ 418, 419, and cases cited; *Brice v. Stokes*, 11 Vesey, 324; *Styles v. Grey*, 1 Mac N. & G. 422; *Monell v. Monell*, 5 Johns. Ch. 293-296; *People v. Townsend*, 37 Barb. 527; *Wilmerding v. McKesson*, 103 N. Y. 329, and cases cited at p. 340.) It is unnecessary to cite further authorities upon such well-settled propositions. They will be found collected in the treatises on trusts; to which department of jurisprudence the matter of the administration of assets is referable for its governing principles.

There is no question of creditors to consider here. Mrs. Miller was the party principally interested in the estate and, at the same time, she had the power to protect herself in various ways. For injuries to our rights from the fraudulent acts or deception of others we are allowed to seek redress, but

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for the consequences to ourselves of poor advice from others, of our own mistakes of judgment in business affairs, or with respect to the capacity of persons whom we employ, I see no relief in the law. Nor is the result affected by considerations of the respondent's position as *cestui que trust*. If there were breaches of trust committed by the administrator, in his management of the affairs of the estate, the concurrence of the *cestui que trust*, or her subsequent assent or acquiescence therein, with the means of knowledge afforded to her, would forever estop her from proceeding against the administrator, acting as her trustee, for the consequences therefrom. (Lewin on Trusts, 773, 774.) That author cites the case of *Brice v. Stokes* (11 Ves. 319), where it was said that knowledge in the *cestui que trust* of an improper act of the trustee has been held to prevent the former from holding the latter answerable. Such a principle would seem to merit especial application in a case like the present one, where the *cestui que trust* was associated in the very trust itself.

We hold, therefore, that just so far as Mrs. Miller had the means of knowing of her co-administrator's acts and assented to, or acquiesced in them, she is bound. The question is merely between the two. Where concurrence in the action of Niles can be proved, or, with adequate knowledge of it, she is proved to have assented, expressly, or by her passiveness should be deemed to have acquiesced in it, as co-administratrix she is chargeable with its consequences, and as beneficiary she is estopped from objecting to it; provided that she is unable to prove fraudulent practices by Niles, by which she was misled and deceived as to the facts of each transaction.

As the case was tried on a mistaken theory as to the liability of Mr. Niles, as one of the administrators, towards Mrs. Miller, it should be remitted to the Surrogate's Court for further proceedings, in conformity with the principles indicated in this opinion, and judgment should be entered accordingly, with costs to the appellant, to be paid from the estate.

All concur, ANDREWS, J., in result.

Judgment accordingly.

Statement of case.

113	560
117	429
117	432
118	560
137	66
137	219

In the Matter of the Judicial Settlement of the Account of
CAROLINE P. T. CRAWFORD et al., as Executors, etc.

T. deposited certain moneys in a bank and in a trust company to the credit of his daughter C. The first deposit was made in her presence and for her personal use. The deposits were entered in a pass-book which was delivered by T. to C. The latter drew out the deposits in bank and deposited them in the trust company, where they were included in the account with the deposit then made by T. *Held*, that there was a valid and irrevocable gift, fully completed and executed, vesting the absolute title to the deposits in C.

T. purchased certain coupon bonds, payable to bearer, which were kept by him up to the time of his death, and he cut off and collected the coupons as they fell due, except those falling due during six months prior to his death. At the time of the purchase of the bonds T. stated that he wanted them for C. and afterwards he directed his banker, who made the purchase for him, to have them registered in her name. The banker took them to the office of the company which issued them and the name of C. was indorsed upon each bond with date of indorsement and name of the transfer agent. It did not appear that C. knew anything of the transaction. *Held*, that, as there was no delivery of the bonds, there was no completed gift.

Martin v. Funk (75 N. Y. 134) distinguished.

The bonds were issued by a foreign corporation, and made payable in New York or Philadelphia. *Held*, that the act of 1871 (Chap. 84, Laws of 1871), providing for the registry of railroad and other corporate mortgage bonds did not apply; that it applied only to bonds which have been or may be issued and are payable in this state; but that even if said act was applicable, the registry did not change the legal title to the bonds while the original owner continued to hold them; that the title would not pass until a delivery of the bonds to the intended donee or to some one for her, although the general negotiability of the bonds might have been destroyed by the indorsement.

T. left a will, executed after all of the deposits, except one small one, were made, by which various legacies were given to C. *Held*, that there was no ademption of the legacies by the gift of the moneys deposited, nor were they adeemed *pro tanto* by the deposit made after the execution of the will.

Where a will gave the testator's residuary estate to his executors in trust, with authority to sell the real estate and to divide the whole into specified parts, each to be kept invested and the income paid to a beneficiary named during life, *held*, that upon the division, the duties of the executors, as such, ceased, and they held the property as trustees; and so, they were entitled to double commissions.

(Argued April 15, 1889; decided June 4, 1889.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 6, 1888, which modified, and affirmed as modified, a decree of the surrogate of the county of Orange on settlement of the accounts of the executors of the estate of Peter Townsend, deceased.

Said Peter Townsend died in September, 1885, leaving a will executed on the 8th day of August, 1883. This will was duly probated, and in December, 1886, his executors filed their account.

The objectors before the surrogate raised no question as to the correctness of the figures contained in the account, or as to the disposition of the estate that came into the hands of the executors, but it was claimed that they had neglected to charge themselves with certain bonds of the Shenandoah Valley Railroad and with certain moneys deposited with the Farmers' Loan and Trust Company to the credit of Caroline P. T. Crawford, amounting to \$102,120. Mrs. Crawford claimed these bonds and this money as gifts made to her by the testator in his lifetime. It was on these issues that evidence was taken and findings made by the surrogate.

The facts material to the questions discussed are stated in the opinion.

William D. Shipman for appellants. There are two essentials to a valid gift, an intention to give and a sufficient delivery. (*Young v. Young*, 80 N. Y. 422, 430; *Jackson v. T. T. S. R. R. Co.*, 88 id. 520, 526; *Basket v. Hassell*, 107 U. S. 602; *Scott v. Lannan*, 104 Penn. St. 593; *Flanders v. Blandy*, 12 N. E. Rep. 321; *Sherman v. N. B. F. C. S. Bk.*, 133 Mass. 581; *Nutt v. Morse*, 142 id. 1; *Bunn v. Markham*, 2 Taunt. 224; *Farguharson v. Cave*, 2 Coll. 356; *Trimmer v. Danby*, 25 L. J. [N. S.] Eq. 424.) The deposit of money in the trust company was not intended to constitute a present gift to Mrs. Crawford. The intent is a necessary element of the transaction. (*Jackson v. T. T. S. R. R. Co.*,

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88 N. Y. 520, 526.) Even if the gifts to Mrs. Crawford were valid, as such, they constituted adoptions *pro tanto* of the provisions for her in the will. (4 Kent's Comm. [11th ed.] 646; *Hine v. Hine*, 39 Barb. 507, 511; *Ex parte Oakey*, 1 Bradf. 281; *Langdon v. Astor*, 16 N. Y. 9, 34; *Benjamin v. Dimick*, 4 Redf. 7; *Beebe v. Estabrook*, 79 N. Y. 246; *Alexander v. Alexander*, 1 N. Y. S. R. 508; *Paine v. Parsons*, 14 Pick. 318; *Kirk v. Eddowes*, 3 Hare, 509; *Dugan v. Hollins*, 14 Md. Ch. Dec. 139; *Hopwood v. Hopwood*, 7 H. L. Cas. 728; *Miner v. Atherton*, 35 Penn. St. 528; *Leighton v. Leighton*, Eng. L. R., 18 Eq. 458; *Van Houten v. Post*, 33 N. J. Eq. 344; *Lawrence v. Lindsay*, 68 N. Y. 108; 2 Williams on Exrs. [Perkin's Am. ed.] 1439; *Durham v. Wharton*, 10 Bligh. 526, 544; 3 Cl. & Fin. 146; *Trimmer v. Bayne*, 7 Ves. 508; *Baugh v. Reid*, 1 id. 257; *Monck v. Monck*, 1 Ball & B. 298; *Platt v. Platt*, 3 Sim. 503; *Barry v. Harding*, 1 J. & L. T. 475; *Twinning v. Powell*, 2 Coll. 262; *Chichester v. Coventry*, 2 H. L. 71; *Bedell v. Carl*, 33 N. Y. 581.) The executors were properly allowed only half commissions on principal. (*Johnson v. Lawrence*, 95 N. Y. 154; *Laytin v. Davidson*, Id. 263.)

John M. Bowers for respondents. The money deposited in the Farmers' Loan and Trust Company to the credit of Caroline P. T. Crawford was actually given and delivered to her by the testator in his lifetime. It was reduced to possession by her and constitutes a completed gift. (1 Gray's Cases on Property, 165, 167; *Brinckerhoff v. Lawrence*, 2 Sandf. Ch. 402; *Davis v. Davis*, 1 N. & M. 225; *Grangiac v. Arden*, 10 Johns. 293; *Francis v. B. El. R. R. Co.*, 17 Abb. N. C. 1; *Grymes v. Hone*, 49 N. Y. 17, 22; *De Caumont v. Bogert*, 36 Hun, 382; *Jones v. Farrell*, 1 De G. & J. 208; Addison on Cont. [6th ed.] 821; *Sargent v. E. M. R.*, 9 Pick. 201; *Nat. Bk. v. Watsonstown Bk.*, 105 U. S. 222.) The registration of the bonds in the name of Mrs. Crawford was, in effect, an assignment to and delivery to her. It was not essential that this assignment should have been communi-

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cated to the assignee. (*Sharpless v. Welsh*, 4 Dallas, 279.) The registration by the company must be treated as a registration for Mrs. Crawford's benefit; and under the wording of the above act of 1871 (chap. 84), Mr. Townsend could never reacquire the title he had given up except by obtaining Mrs. Crawford's indorsement. (*Young v. Young*, 80 N. Y. 422; *Jackson v. T. T. S. R. Co.*, 88 id. 520.) While a delivery is necessary there is no rule which requires an absolute personal transaction between the donor and donee by which he puts the securities into the donee's possession as being the sole test. (*Gray v. Barton*, 55 N. Y. 72; 2 Kent's Com. 439; *Champney v. Blanchard*, 39 N. Y. 111; *Westerlo v. De Witt*, 36 id. 340; *Grymes v. Hone*, 49 id. 17; *Hunter v. Hunter*, 19 Barb. 638; *Whiting v. Barrett*, 7 Lans. 109; *Martin v. Funk*, 75 N. Y. 134; *Richardson v. Richardson*, L. R., 3 Eq. Cas. 684; *Morgan v. Malleson*, L. R., 10 id. 475; *Armitage v. Mace*, 96 N. Y. 538; *Doty v. Wilson*, 47 id. 584; *Fulton v. Fulton*, 48 Barb. 591.) There was no ademption of the provisions made in the testator's will in favor of Mrs. Crawford by either of the gifts referred to in the foregoing points. (*Abbott v. Middleton*, 7 H. L. C. 89; *Gordon v. Gordon*, L. R., 5 H. L. 284; *Sequine v. Sequine*, 4 Abb. Ct. App. Dec. 194; *Clapp v. Fullerton*, 34 N. Y. 192; *Arnold v. Haronn*, 43 Hun, 278; *De Caumont v. Bogert*, 36 id. 391; *Doty v. Wilson*, 47 N. Y. 586; 2 Williams on Exrs. 1070; 2 Wharton's Evidence [3d ed.], § 1003a.) The executors are entitled to commissions as executors on all funds received and paid out by them, including the balance paid over by them to themselves as trustees. (*Laytin v. Davidson*, 95 N. Y. 266; 29 Hun, 622; *Meeker v. Crawford*, 5 Redf. 450; *In re Mason*, 98 N. Y. 527; *Phoenix v. Livingston*, 101 id. 451; *Irving Bk. v. Adams*, 28 Hun, 108; *Stillwell v. Carpenter*, 62 N. Y. 639.)

PECKHAM, J. We agree with the courts below in regard to the deposit of moneys in the bank, and, subsequently, in the trust company. There was an executed gift, completed by a

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full delivery of the subject thereof, and a change of title therein. The surrogate has found that the donor made the first deposit to the credit of Mrs. Crawford in the bank in her presence, and for her personal and specific use. The subsequent deposits he also finds were made by the donor in the trust company to the credit of Mrs. Crawford, and they were entered in a pass-book supplied by the company, which book was delivered by the donor to her. There was evidence sufficient to authorize such findings. The donor thus parted completely with the title to the moneys which he deposited, and the same became subject to the exclusive and entire control of the donee, and were legally and in fact in her full possession. She herself drew the \$30,000 which had been deposited in her credit in the bank, and they were deposited in the trust company, and formed part of the whole fund which was from time to time deposited by the donor in such company in her credit.

There was nothing more that could have been done in order to clothe the donee with the absolute and full title and control of the moneys thus deposited, and nothing more was necessary to complete a valid and irrevocable gift. It is very probable that one of the motives which prompted the first deposit on the part of the donor was that the donee should have some money in the house in case he should be taken away. One of the witnesses testified that the donor so stated in his presence. But the evidence is as we think entirely insufficient to show that the gift of the \$30,000 was made upon the condition that it should not take effect until his death. Nor are the subsequent deposits in the light of the evidence to be regarded as a gift only upon that condition. When all the circumstances the facts make a valid and irrevocable gift in present of the moneys in question.

But we cannot assent to the conclusion of the court below, which held the funds to have been absolutely disposed of by the testator to the donee in his lifetime as a valid gift completed by delivery to Mrs. Crawford, and that she was to be his agent. We do not think there was any such delivery. The

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may have intended the bonds as a gift, but his intention was never, as we think, effectually carried out. They were coupon bonds payable to bearer, and were bought by the direction of the donor, by his broker, and delivered to the donor and kept by him up to the time of his death. There was a book found among his effects after his death, which purported to be an inventory of the securities of his estate in which these bonds were entered, some of the entries, if not all, were in his handwriting. The coupons for the semi-annual interest had been cut off by him and collected for him as they became due subsequent to the purchase, excepting those which were due six months prior to his death, and those coupons had not been detached from the bonds. The proceeds of the coupons which had been collected had been passed to his credit by the bankers who collected them. It appeared in evidence that the donor had given direction to his bankers to purchase the bonds, and he stated at the time that he wanted them purchased for Carrie (the intended donee), and after they had been purchased he directed his banker to have them registered in her name, and the banker thereupon took them to the office of the company and the name of the intended donee was indorsed upon each bond, together with the date of such indorsement and the name of the transfer agent. The bonds were then brought back and delivered to the donor, who kept them thereafter as above stated. There is no evidence that the donee knew anything of the transaction or that she was ever aware of anything concerning the intended gift.

Upon these facts we do not see that there was ever any delivery of the bonds. Nothing appears in the case as to what was the effect of the so-called registry. We are not prepared to hold that the simple indorsement on a bond payable to bearer, of the name of another party than the true owner, made at his request and at the office of the company issuing the bond, and by an officer thereof, passes the title to the bond to the party whose name is thus indorsed. An owner of a bond may intend to give it to another, and for that purpose he may obtain such an indorsement, but that does not

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full delivery of the subject thereof, and a change of title therein. The surrogate has found that the donor made the first deposit to the credit of Mrs. Crawford in the bank in her presence, and for her personal and specific use. The subsequent deposits he also finds were made by the donor in the trust company to the credit of Mrs. Crawford, and they were entered in a pass-book supplied by the company, which book was delivered by the donor to her. There was evidence sufficient to authorize such findings. The donor thus parted completely with the title to the moneys which he deposited, and the same became subject to the exclusive and entire control of the donee, and were legally and in fact in her full possession. She herself drew the \$30,000 which had been deposited to her credit in the bank, and they were deposited in the trust company, and formed part of the whole fund which was, from time to time, deposited by the donor in such company to her credit.

There was nothing more that could have been done in order to clothe the donee with the absolute and full title and control of the moneys thus deposited, and nothing more was necessary to complete a valid and irrevocable gift. It is very probable that one of the motives which prompted the first deposit on the part of the donor was that the donee should have some money in the house in case he should be taken away. One of the witnesses testified that the donor so stated in his presence. But the evidence is, as we think, entirely insufficient to show that the gift of the \$30,000 was only upon the condition that it should not take effect until his death. Nor can the subsequent deposits, in the light of the evidence, be regarded as a gift only upon that condition. Within all the authorities the facts make a valid and executed gift *in presenti* of the moneys in question.

But we cannot assent to the decisions of the courts below, which hold the bonds to have been effectually disposed of by the intending donor in his lifetime by a valid gift, completed by delivery, to Mrs. Crawford or to any one for her as her agent. We do not think there was any such delivery. He

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may have intended the bonds as a gift, but his intention was never, as we think, effectually carried out. They were coupon bonds payable to bearer, and were bought by the direction of the donor, by his broker, and delivered to the donor and kept by him up to the time of his death. There was a book found among his effects after his death, which purported to be an inventory of the securities of his estate in which these bonds were entered, some of the entries, if not all, were in his handwriting. The coupons for the semi-annual interest had been cut off by him and collected for him as they became due subsequent to the purchase, excepting those which were due six months prior to his death, and those coupons had not been detached from the bonds. The proceeds of the coupons which had been collected had been passed to his credit by the bankers who collected them. It appeared in evidence that the donor had given direction to his bankers to purchase the bonds, and he stated at the time that he wanted them purchased for Carrie (the intended donee), and after they had been purchased he directed his banker to have them registered in her name, and the banker thereupon took them to the office of the company and the name of the intended donee was indorsed upon each bond, together with the date of such indorsement and the name of the transfer agent. The bonds were then brought back and delivered to the donor, who kept them thereafter as above stated. There is no evidence that the donee knew anything of the transaction or that she was ever aware of anything concerning the intended gift.

Upon these facts we do not see that there was ever any delivery of the bonds. Nothing appears in the case as to what was the effect of the so-called registry. We are not prepared to hold that the simple indorsement on a bond payable to bearer, of the name of another party than the true owner, made at his request and at the office of the company issuing the bond, and by an officer thereof, passes the title to the bond to the party whose name is thus indorsed. An owner of a bond may intend to give it to another, and for that purpose he may obtain such an indorsement, but that does not

constitute a delivery of the gift to such person. The owner may subsequently change his mind, and we do not say that he could not effectuate such change without the aid of an intended donee to whom he had never delivered the gift. The most that the evidence shows is an intention to make a gift of these bonds, but the material fact of a delivery is entirely unproved and cannot be implied from the evidence.

The case has nothing in common with that of *Martin v. Funk* (75 N. Y. 134), and kindred cases. There was a declaration of trust in those cases in such form that the donor stated that he was, and he thereby became, a trustee for the donee, and the deposit or gift was made in that character. Nothing of the kind exists here.

Neither can it be successfully argued that the delivery of the bonds by the donor to the banker to have them registered in the name of the donee, was a delivery to the agent of the donee. It was just what it purported to be on its face, a delivery of the bonds to his own banker, who had purchased them under his own directions, and the banker continued to act as the agent of the person under whose directions he purchased them, when he had the bonds registered as he was by him directed to do.

Nor does it seem that any aid is furnished the respondent by reference to the act of 1871, chapter 84. That act provides for a registry of railroad and other corporate mortgage bonds payable to bearer, for which a registry is not by law provided, which have been or may thereafter be issued and made payable in this state, so as to render such bonds non-negotiable. The act would seem to refer only to bonds which have been or may be issued and payable in this state. The bonds in question were issued in the state of Virginia and payable in Philadelphia or New York, the principal in 1921, and the interest semi-annually.

But even if applicable to these bonds, the registration had no effect upon the coupons, and the possession of the bonds by the original owner gave him complete control over the coupons and entire power to collect them and otherwise dispose

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of them. And again, even if the registry rendered the bonds themselves non-negotiable, we do not see that such fact absolutely changed the legal title to them while the original owner continued to hold them and failed to carry out his intention to give by a delivery of the bonds to the donee. To render a bond non-negotiable, by the mere registry of it in the name of another, is not by any means the same in law or in fact as the transfer of the title to the instrument to the party in whose name it may be registered. The title does not pass until a delivery of the bond to the person intended, or to some one for him, although the general negotiability of the bond may have been destroyed by the indorsement. If an owner of shares of stock in a corporation, intending to give them to A., should take the scrip to the office of the company and surrender it and receive new scrip in the name of A., has he by this mere change of title on the books of the company, while retaining the entire possession and control of the scrip, and without any delivery thereof to A., accomplished a valid executed gift of the ownership of the shares to his intended donee? We should say clearly not. In this case the bonds belonged to the donor, as all agree, up to the time of the delivery for registry. After that, even if it be assumed that they were in consequence thereof rendered non-negotiable, how does that change the title? How does it divest the original owner of his right to the bond and to its possession and control? Could the intended donee maintain an action against the donor to obtain its possession? We think not, and for the very good reason that it would not belong to him.

What the particular rights of the original owner, as against the company, might be, and how he should proceed in case he met with a refusal of the company on his demand to erase the registry, are questions not now arising. We are of the opinion, however, that if it be conceded that the donor intended to give these bonds away, he never accomplished such purpose by any valid delivery thereof, and they remained his property at the time of his death.

We also think that there was no ademption of the legacies

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full delivery of the subject thereof, and a change of title therein. The surrogate has found that the donor made the first deposit to the credit of Mrs. Crawford in the bank in her presence, and for her personal and specific use. The subsequent deposits he also finds were made by the donor in the trust company to the credit of Mrs. Crawford, and they were entered in a pass-book supplied by the company, which book was delivered by the donor to her. There was evidence sufficient to authorize such findings. The donor thus parted completely with the title to the moneys which he deposited, and the same became subject to the exclusive and entire control of the donee, and were legally and in fact in her full possession. She herself drew the \$30,000 which had been deposited to her credit in the bank, and they were deposited in the trust company, and formed part of the whole fund which was, from time to time, deposited by the donor in such company to her credit.

There was nothing more that could have been done in order to clothe the donee with the absolute and full title and control of the moneys thus deposited, and nothing more was necessary to complete a valid and irrevocable gift. It is very probable that one of the motives which prompted the first deposit on the part of the donor was that the donee should have some money in the house in case he should be taken away. One of the witnesses testified that the donor so stated in his presence. But the evidence is, as we think, entirely insufficient to show that the gift of the \$30,000 was only upon the condition that it should not take effect until his death. Nor can the subsequent deposits, in the light of the evidence, be regarded as a gift only upon that condition. Within all the authorities the facts make a valid and executed gift *in presenti* of the moneys in question.

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may have intended the bonds as a gift, but his intention was never, as we think, effectually carried out. They were coupon bonds payable to bearer, and were bought by the direction of the donor, by his broker, and delivered to the donor and kept by him up to the time of his death. There was a book found among his effects after his death, which purported to be an inventory of the securities of his estate in which these bonds were entered, some of the entries, if not all, were in his handwriting. The coupons for the semi-annual interest had been cut off by him and collected for him as they became due subsequent to the purchase, excepting those which were due six months prior to his death, and those coupons had not been detached from the bonds. The proceeds of the coupons which had been collected had been passed to his credit by the bankers who collected them. It appeared in evidence that the donor had given direction to his bankers to purchase the bonds, and he stated at the time that he wanted them purchased for Carrie (the intended donee), and after they had been purchased he directed his banker to have them registered in her name, and the banker thereupon took them to the office of the company and the name of the intended donee was indorsed upon each bond, together with the date of such indorsement and the name of the transfer agent. The bonds were then brought back and delivered to the donor, who kept them thereafter as above stated. There is no evidence that the donee knew anything of the transaction or that she was ever aware of anything concerning the intended gift.

Upon these facts we do not see that there was ever any delivery of the bonds. Nothing appears in the case as to what was the effect of the so-called registry. We are not prepared to hold that the simple indorsement on a bond payable to bearer, of the name of another party than the true owner, made at his request and at the office of the company issuing the bond, and by an officer thereof, passes the title to the bond to the party whose name is thus indorsed. An owner of a bond may intend to give it to another, and for that purpose he may obtain such an indorsement, but that does not

constitute a delivery of the gift to such person. The owner may subsequently change his mind, and we do not say that he could not effectuate such change without the aid of an intended donee to whom he had never delivered the gift. The most that the evidence shows is an intention to make a gift of these bonds, but the material fact of a delivery is entirely unproved and cannot be implied from the evidence.

The case has nothing in common with that of *Martin v. Funk* (75 N. Y. 134), and kindred cases. There was a declaration of trust in those cases in such form that the donor stated that he was, and he thereby became, a trustee for the donee, and the deposit or gift was made in that character. Nothing of the kind exists here.

Neither can it be successfully argued that the delivery of the bonds by the donor to the banker to have them registered in the name of the donee, was a delivery to the agent of the donee. It was just what it purported to be on its face, a delivery of the bonds to his own banker, who had purchased them under his own directions, and the banker continued to act as the agent of the person under whose directions he purchased them, when he had the bonds registered as he was by him directed to do.

Nor does it seem that any aid is furnished the respondent by reference to the act of 1871, chapter 84. That act provides for a registry of railroad and other corporate mortgage bonds payable to bearer, for which a registry is not by law provided, which have been or may thereafter be issued and made payable in this state, so as to render such bonds non-negotiable. The act would seem to refer only to bonds which have been or may be issued and payable in this state. The bonds in question were issued in the state of Virginia and payable in Philadelphia or New York, the principal in 1921, and the interest semi-annually.

But even if applicable to these bonds, the registration had no effect upon the coupons, and the possession of the bonds by the original owner gave him complete control over the coupons and entire power to collect them and otherwise dispose

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of them. And again, even if the registry rendered the bonds themselves non-negotiable, we do not see that such fact absolutely changed the legal title to them while the original owner continued to hold them and failed to carry out his intention to give by a delivery of the bonds to the donee. To render a bond non-negotiable, by the mere registry of it in the name of another, is not by any means the same in law or in fact as the transfer of the title to the instrument to the party in whose name it may be registered. The title does not pass until a delivery of the bond to the person intended, or to some one for him, although the general negotiability of the bond may have been destroyed by the indorsement. If an owner of shares of stock in a corporation, intending to give them to A., should take the scrip to the office of the company and surrender it and receive new scrip in the name of A., has he by this mere change of title on the books of the company, while retaining the entire possession and control of the scrip, and without any delivery thereof to A., accomplished a valid executed gift of the ownership of the shares to his intended donee? We should say clearly not. In this case the bonds belonged to the donor, as all agree, up to the time of the delivery for registry. After that, even if it be assumed that they were in consequence thereof rendered non-negotiable, how does that change the title? How does it divest the original owner of his right to the bond and to its possession and control? Could the intended donee maintain an action against the donor to obtain its possession? We think not, and for the very good reason that it would not belong to him.

What the particular rights of the original owner, as against the company, might be, and how he should proceed in case he met with a refusal of the company on his demand to erase the registry, are questions not now arising. We are of the opinion, however, that if it be conceded that the donor intended to give these bonds away, he never accomplished such purpose by any valid delivery thereof, and they remained his property at the time of his death.

We also think that there was no ademption of the legacies

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to Mrs. Crawford by the gift of the money. We are not able to see how a legacy can be adeemed by a gift made before the execution of the will in which the legacy was given. The small deposit which was made subsequent to the making of the will was but carrying out a purpose entertained long prior thereto, and the legacy contained in the will was not, as we think, adeemed *pro tanto* by the deposit mentioned.*

* * * * *

Lastly, we think the court at General Term was right in awarding double commissions. As executors, it was their duty to pay the debts of the deceased, and then all the residue of the property, which was not devised or bequeathed to others, was, by the third clause of the testator's will, given to the executors in trust for the purposes therein mentioned. They were authorized to sell all the real estate thus devised to them, and they were then directed to divide all the property they received into thirty-two equal parts, and to invest in their names, as trustees of his will, five parts for the benefit of his daughter Mrs. Meagher, and to pay over to her the interest and income thereof during her life, and upon her decease to transfer the same as therein directed. Eight of such thirty-two parts were to be invested in their names as trustees under his will for the benefit of his daughter, Mrs. Barlow, and the interest and income thereof were to be paid to her during her life, and upon her death the property was to be transferred as directed in the will, and the remaining nineteen parts were to be similarly invested, and on the same terms, for the benefit of his daughter, Mrs. Crawford, during her life, with remainder over.

We think that after the sale of the real estate and the payment of debts the duty of the executors ended by the payment to the trustees of the thirty-two parts into which the

* NOTE.—The omitted portion of the opinion relates to exceptions to evidence alleged to have been erroneously received on the trial. The conclusion of the court in regard to such evidence is, that striking it out there remained sufficient evidence not contradicted which demanded the decision made by the surrogate, and that, therefore, there was no ground for reversal.

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estate directed to be paid over to them was to be divided. From that time the duties of the trustees commenced, and they were to invest in their names, as trustees, the five, eight and nineteen parts, respectively, in accordance with the directions of the will, and at the death of the testator's daughters, respectively, the trust estate is to be paid by them as trustees, and not as executors. This gives them the right to double commissions.

The order of the General Term should be modified by charging the executors with the twenty Shenandoah Valley bonds, and as modified affirmed, with costs of all parties to be paid out of the estate.

All concur.

Judgment accordingly.

113	569
123	402
113	569
135	568

In the Matter of Proving the Last Will and Testament of
HIRAM VOWERS, Deceased.

113	569
78	AD ⁶¹²

Although a gift by express terms is not made in a will, a legacy by implication may be upheld where the words of the will leave no doubt of the testator's intent and can have no other reasonable interpretation.

V. died, leaving a widow but no children. His will, after a provision made for his wife, contained this clause: "This provision to be accepted by my wife in lieu of her dower right *and distributive share in my estate*, she to make her election, whether she accepts this provision of my will, within sixty days from the time of proving the same." The widow within the time specified made her election, rejecting the provision. The residuary estate was given to a nephew of the testator. In proceedings for the probate of the will, *held*, that, aside from her dower right, the widow was entitled to such share of the personal estate as the law would have given her had the deceased died intestate.

The executor claimed that the widow had no right to raise the question of construction, upon probate of the will, as it involved both real and personal estate. *Held*, untenable; that the widow simply put in issue a disposition of personal property, and such a disposition the Code of Civil Procedure (§ 2624) permits a party to put in issue upon probate.

In re Vowers (45 Hun, 418) reversed.

(Argued April 15, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme
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Court in the third judicial department, entered upon an order made July 11, 1887, which affirmed a decree of the surrogate of Warren county herein.

The question presented was simply as to the construction of a clause in the will of the testator, which is set forth in the opinion.

S. Brown for appellant. The language of the will will be understood in its ordinary signification, unless it appears to be used in some other sense. (*Christie v. Phyfe*, 19 N. Y. 348; *Stinson v. Vroman*, 99 id. 80; *Wager v. Wager*, 96 id. 167; Schouler on Wills, §§ 466-474; 2 Wms. on Exrs. [7th ed.] 1084, Rule of Construction 4.) Provisions in a will, intended for the support of the wife, will receive the most favorable construction to accomplish the purpose intended. (*Thurber v. Chambers*, 66 N. Y. 48.) The words "distributive share in my estate" were used by the testator in the will to describe and measure a bequest in the alternative to the appellant of so much of his personal estate as she would have been entitled to under the statute of distribution if the testator died intestate. (*Marsh v. Hague*, 1 Edw. Ch. 174; Redf. on the Law of Wills [2d ed.] § 14; *Wager v. Wager*, 96 N. Y. 172; Schouler on Wills, § 561; Jarman on Wills [5th Am. ed.] chap. 17, note a; *O'Hara v. Dever*, 46 Barb. 609; 3 Abb. Ct. App. Dec. 407; 2 Keyes, 558.)

L. H. Northrup for respondent. The widow takes distributive share, as such, only in cases of intestacy. (3 R. S. [7th ed.] 2303.) The distributive share in this case would be one-half and \$2,000. (3 R. S. [7th ed.] 2303.) Burge, the legatee, was not a "descendant" of the testatrix. If he died before the testatrix, the devise to him would lapse. (*Van Buren v. Dash*, 30 N. Y. 393.) The widow would take a distributive share in a lapsed legacy. (7 Lans. 492.) Even in a doubtful case the courts do not favor implied devises for the benefit of the widow as against the heir. (*Quinn v. Hardenbrook*, 54 N. Y. 83.)

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FINCH, J. The question of construction raised by the language of the testator in framing the provision for his wife is of a character so unusual that we can find no precise parallel or precedent in the courts of our own state. The case is one of a legacy by implication; that is, created, not by a direct or express gift, but inferred from language which shows an intention to give the legacy, and can have no other reasonable explanation. Instances of such legacies are not uncommon in the English reports, and a reference to some of them will disclose their general character and the rule of solution adopted.

In *Goodright v. Hoskins* (9 East, 306) the action was ejectment to recover certain leasehold premises which the testator possessed in his lifetime, for a term of ninety-nine years. His will gave the estate to his son Richard, until the latter's eldest son, Thomas, should attain twenty-one, and no longer; if Thomas should die in his minority, then the estate was to go to his younger brothers, John or Richard, or either of them, who should attain twenty-one. The testator thereupon added, "and I desire the said premises of Roskief may be quitted and delivered up as aforesaid by my said son Richard Hoskins, accordingly." It was argued, for the plaintiff, that there was no gift to Thomas, in terms, on his arriving at the age of twenty-one, which was true; but Lord ELLENBOROUGH said there was a strong implication, from the words of the will, that the testator meant that Thomas should have Roskief, for his father, at the majority of Thomas, was to quit and deliver up the premises, and to whom, if not to Thomas? The court added an expression of pleasure that they found themselves warranted by the authorities in establishing a gift to Thomas by implication. In *Thorp v. Owen* (2 Hare, 607), the testator's direction, that everything should remain "as it now is" during the life of his wife, was held to give her a life interest by implication. The rule of construction which seems to have prevailed is, that the inference from the will need not be irresistible or such as to exclude all doubts possible to be raised, but must, nevertheless, be such as to leave no hesitation in the mind of the court, and must not rest upon mere conjecture.

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The intention must be clear so that no other reasonable inference can be made. (*Grout v. Hopgood*, 13 Pick. 164.) In our own state we are referred to *Marsh v. Hague* (1 Edw. Ch. 174), in which bequests were implied to children of an uncle, not included in the list of legatees, by force of a subsequent clause, which assumed that the gift had been made to them. The court said there was no other rational meaning to be given to the expressions used, and that construction must be adopted or the words of the testator rejected as senseless or useless, which was not permissible. Undoubtedly, in every such case we must be quite sure of the testator's intention, and not substitute for it some notion of our own; but when his words leave no doubt about his intention and can have no other reasonable interpretation, we are justified in upholding a legacy by implication where no gift in express terms has been made. Assuming this to be a correct statement of the law, we may now inquire whether the facts of the present case fall within the range of its application.

The testator had a wife, but no children. By his will he first directed the payment of his debts, and then provided as follows: "Second. I give, devise and bequeath unto my beloved wife, Marietta Vowers, the use of my dwelling-house and furniture therein for and during her natural life, said dwelling-house being the same in which I now reside in the village and town of Caldwell aforesaid, and I also direct my executor, hereinafter named, to pay to my said wife annually, for and during her natural life, the sum of fifty dollars, to have and to hold the same to her sole use and benefit. This provision to be accepted by my wife *in lieu* of her dower right and *distributive share in my estate*. She to make her *election* whether she accepts this provision of my will within sixty days from the time of proving the same." The testator then gave all the rest and residue of his property to his nephew, Orrin Burge, with a power of sale, and naming him as executor. The widow within the sixty days made her election and rejected the provision for the use of the house and the annuity, and thereupon claimed that she was entitled

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not only to her dower but to a bequest, by implication, of a sum equivalent to what would have been her distributive share had the testator died without a will. On the probate of the will before the surrogate she filed allegations putting expressly in issue the construction of the will as it respected the implied legacy claimed. The decision of the surrogate was adverse to her construction and was affirmed in the General Term by a divided court. The executor here objects that the widow had no right upon the probate of the will to raise the question of construction because that question involved both real and personal estate. The Code permits (§ 2624) a party in such a proceeding to put in issue "the validity, construction or effect of any disposition of personal property." It was such a disposition, and that alone, which the widow put in issue upon the hearing and which the surrogate decided. The sole inquiry was whether the terms of the will, if she rejected the provision primarily made for her benefit, gave her by implication a legacy equal to what would have been her distributive share in a case of intestacy. No question whatever was raised or involved as to the real estate.

By the terms of the will the widow was given an *election*, which implies a choice between alternatives, and what those were in the thought and intention of the testator is the natural and primary inquiry. The executor claims, and is compelled to claim, in order to reach his result, that the alternatives were the use of the house and the annuity on the one hand, and dower alone on the other, or the testator's provision in the one event and the law's provision in spite of the will in the other. But those alternatives he neither expressed nor intended. To say that he did, requires us to strike out the expression "her distributive share of my estate" as useless and meaningless. It compels us to construe it as a mere careless and inapt amplification of the word "dower," and adding nothing to that expression. We have no right to treat it as meaningless, and it certainly was not careless or inapt. It is a perfectly accurate expression, describing a certain quantity of interest in the property of an intestate, and must be deemed to have been

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used intelligently, purposely, and to aid in disclosing the testator's real intention. All these fixed rules we must violate if we hold the respondent's theory that the alternatives, between which the widow was required to choose, were the testator's provision on the one hand and dower only on the other. It is inevitable, on that construction, that the words relating to a distributive share shall have no meaning, and can have none, and must be utterly expunged from the will. The pressure of this difficulty has led the respondent to suggest that, since the residuary legatee might have died in the lifetime of the testator, and his legacy lapsed, and so the widow come in for a distributive share, it was that possibility which he meant to cut off. But the testator said nothing of the kind. He described, not an interest in a lapsed legacy, but an interest which the law would give where there was no will and no legacy lapsed or otherwise. It is *her* distributive share in my estate; that share to which she would have been entitled had no will been made. So that the respondent is driven back to the position that the phrase is superfluous, has no meaning, indicates no intention, and must be wholly disregarded, and that, too, in behalf of a nephew, and against a wife for whom the law sedulously frames protection. The contrary construction seems to me natural, reasonable and just, and I have no doubt correctly carries out the testator's real intention. When he gave the house and lot and the annuity "in lieu of" dower he perfectly understood that by using that phrase "in lieu of" he put the widow to a choice between two things, either of which she could have, and either of which he meant that she should have according to her preference. And when he added "in lieu of" her distributive share in my estate, he must again have meant that share which she could have, and which she should have, if such was her choice. It is quite probable, as is suggested in the dissenting opinion below, that the testator balanced in his mind the use of the house against the dower and the annuity he provided against the distributive share; his gift of the realty, against the law's provision out of it for the widow, and his gift of the personalty against the law's

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provision out of that, and meant as to both that the widow should choose, but choose promptly and within the sixty days, which he prescribed. We can impute no other meaning to his language, and find for it no different interpretation, and are, therefore, of opinion that in the event which has happened the widow is entitled to such share of the personal estate as the law would have given her had the deceased died intestate.

The judgment of the surrogate appealed from and of the General Term should be reversed with costs of both parties, payable out of the estate, and the case remitted to the surrogate for a proper decree.

All concur.

Judgment accordingly.

GEORGE L. NAY et al., as Administrators, etc., Respondents, v.
JOHN M. CURLEY, Appellant.

118	575
163	351
j 163	355
113	575
77 AD	622

On trial of an action to recover an alleged loan, plaintiffs gave in evidence a check signed by their intestate, payable to defendant, and proved that it was delivered to, indorsed by and paid to him; they then called him as a witness and proved by him that at the time of the delivery of the check said intestate did not owe him anything. As a witness in his own behalf he was asked to state what took place between decedent and himself. This was objected to and excluded as incompetent under the provision of the Code of Civil Procedure (§ 829), excluding the testimony of a party against an executor, etc., in relation to a personal transaction with the decedent. *Held*, error; that said provision did not abrogate the rule of evidence, that where a party calls a witness and examines him as to part of a communication or transaction, the other party may call out the whole, so far as it bears upon or tends to explain the part called out; that, as the testimony of defendant called out by plaintiff tended to rebut the presumption that the transaction *i. e.*, the giving of the check, was the payment of a debt, and to raise the presumption that it was a loan, this opened the whole transaction and entitled defendant to testify in his own behalf in regard thereto.

(Argued April 19, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New

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York, entered upon an order made May 14, 1888, which affirmed a judgment in favor of plaintiffs, entered upon a verdict.

This action was brought to recover the amount of an alleged loan made by plaintiffs' intestate to defendant.

The material facts are stated in the opinion.

Henry Hoyt for appellant. Where one man delivers a sum of money to another, if there be nothing else to explain the transaction, the legal presumption is that the money belonged to the one who received it, and not that he thereby became a debtor to the other. (*Welch v. Seaborn*, 1 Stark. 474; *Gerd- ing v. Waller*, 29 Mo. 426.) The delivery of a check is not evidence of money loaned, but, on the contrary, the presumption is that it was paid upon some debt or obligation owing by the drawer. (*Koehler v. Adler*, 78 N. Y. 287; *Poucher v. Scott*, 98 id. 422; *Fickin v. Carrington*, 31 Gratt. 219; *In re Richardson*, 13 Phil. 251; *Lawson on Presumptive Evidence*, rule 70, p. 303.) Where a party is called as a witness by the adverse party and is examined as to a transaction with a deceased party in reference to which he would have been precluded from testifying in his own behalf, he is entitled to explain his testimony and to state the whole transaction. (*Merritt v. Campbell*, 79 N. Y. 625.)

Charles H. Woodbury for respondents. The evidence that the intestate was not indebted to the defendant at the time when the check was given raises the presumption that it was given as a loan. (*Poucher v. Scott*, 90 N. Y. 422.) There being no indebtedness to pay, there was nothing upon which the presumption that it was in payment of a debt could be founded. (*Stimson v. Vroman*, 99 N. Y. 74, 81; *Fickin v. Carrington*, 31 Gratt. 219; *In re Richardson*, 13 Phil. 241; *Lawson on Presumptive Evidence*, rule 70, p. 304.) Very slight circumstances have been held sufficient to raise the presumption of a loan. (*Bogert v. Morse*, 1 Coms. 377; *Grey v. Grey*, 47 N. Y. 552, 555.) Evidence that a gift was intended

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must be established by proof. (*Ficklin v. Carrington*, 31 Gratt. 219; *Richardson's Est.*, 13 Phil. 251; *Lawson on Presumptive Ev.* rule 70, p. 304; *Grey v. Grey*, 47 N. Y. 552.) The defendant's proposed evidence as to what took place between him and plaintiffs' intestate at the time he received the check was properly excluded. (Code, § 829; *Merritt v. Campbell*, 79 N. Y. 625; *Miller v. Montgomery*, 78 id. 282; *Ham v. Van Orden*, 84 id. 257, 271.) A survivor is competent to testify to any fact other than what is said or done at a personal transaction or communication with the deceased, notwithstanding his evidence may negative that any personal transaction or communication took place. (*Pinney v. Orth*, 88 N. Y. 447, 451; *Hier v. Grant*, 47 id. 278.) The evidence that no indebtedness existed was not prohibited by the statute, and so did not authorize the defendant to testify upon prohibited matters. (*Miller v. Montgomery*, 78 N. Y. 282; *Ham v. Van Orden*, 84 id. 257, 271; *Wood v. Plato*, 23 Hun, 402.)

ANDREWS, J. It is conceded, and it is undoubtedly the general rule, that in the absence of explanation the presumption arising from the delivery of a check is that it was delivered in payment of a debt, and not as a loan. (*Koehler v. Adler*, 78 N. Y. 287; *Poucher v. Scott*, 98 id. 422.) But a check may represent a loan or a gift, or money of the drawer, to be applied by the drawee to the use of the former as his agent or otherwise. The plaintiffs proved that the check was delivered by their intestate to the defendant, the payee, on the day of its date (Dec. 22, 1886); its indorsement by the latter; that it was paid in due course, and that the defendant received the proceeds. Up to this point no cause of action had been established. The plaintiffs then called the defendant as a witness and asked him, "On the 22d day of December, 1886, did Joseph O. Nay owe you any money?" and the defendant answered, "No, sir." This made out a *prima facie* case of a loan. It rebutted the presumption that the check was given in the payment of a debt. This could not

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have been the nature of the transaction if there was no debt owing by the intestate to the defendant. The plaintiffs by this evidence repelled the presumption which would otherwise have arisen, and created the alternative presumption that the check represented a loan. The law does not presume a gift (*Grey v. Grey*, 47 N. Y. 552), and when the plaintiffs rested their case the burden was upon the defendant to show that the transaction was not that which the evidence on the part of the plaintiffs tended to establish, viz., a loan from the decedent to the defendant.

The defendant, on assuming the defense, offered himself as a witness in his own behalf, and after stating that he received the check from the drawer, was asked by his counsel, "State what took place between you and him?" The counsel for the plaintiffs objected to the question on the ground that it was incompetent, and it was excluded by the court. This ruling presents the material question on this appeal. It is sought to be sustained under section 829 of the Code. There can be no doubt that the question was properly excluded, assuming that the plaintiffs had not opened the matter by their examination of the defendant. The evidence sought to be elicited by the excluded question directly pointed to the transaction between the witness and the decedent at the time the check was given, and called for a narrative of what took place between them on that occasion. It was evidence directly within the prohibition of section 829, and did not fall within the exception in that section, since the plaintiffs had not been examined concerning that transaction, in their own behalf or otherwise. There was no error, therefore, in excluding the question put to the defendant, if its admissibility is to be determined by section 829. But that section was not intended to abrogate the principle in the law of evidence, that where a party calls a witness and examines him as to a particular part of a communication or transaction, the other party may call out the whole of the communication or transaction bearing upon or tending to explain or qualify the particular part to which the examination of the other party was directed. This rule does not need

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the sanction of authority. It is founded upon obvious equity and justice. A part of the truth often implies a falsehood, and in the search for truth through the examination of witnesses, courts do not countenance partial statements of facts by witnesses. The principle adverted to is just as applicable in reason to a case where a party calls an adverse party and examines him as to one fact or phase of a transaction in his favor, and then discontinues the inquiry, as in any other. The party examined by the other may, at his own instance, complete the narration for the purpose of explaining, modifying or putting in a different light the particular part to which the examination by the adverse party was restricted. Section 829 in no manner affects the application of the rule. If a party calls the adverse party and examines him as to a personal communication or transaction with a deceased person, in reference to which he would be precluded from testifying in his own behalf under that section, the witness is entitled to state the whole transaction or conversation and thereby explain or qualify the testimony called out by the other party. This was explicitly held in *Merritt v. Campbell* (79 N. Y. 625).

The correctness of the ruling, excluding the defendant from testifying in his own behalf as to what took place between the intestate and himself at the time the check was given, turns upon the point whether the plaintiffs by asking the defendant, on their examination, whether on the day the check was given their intestate owed him anything, and obtaining an answer in the negative, thereby gave proof as to the transaction between the parties at the time of giving the check, and opened the way to the defendant to testify thereto. Evidence of a personal transaction between parties may become material on a trial, (1) where the cause of action originates in the transaction sought to be proved, the transaction itself creating the duty or obligation; or (2), where the communication or transaction tends to establish an antecedent cause of action, or to disprove it, as, for example, where admissions are relied upon, made by one party to the other; or (3), where the original cause of action is admitted, and the communication or trans-

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action is sought to be proved to show that the cause of action had been satisfied or discharged, as by payment or otherwise. In the present case the cause of action, if any, arose out of the giving of the check, and whether it created a cause of action depended upon the real nature of that transaction, whether the check represented a loan, gift or something else. The check, on its face, imported a personal transaction between the parties to the instrument, and that it was, in fact, a personal transaction between them was shown outside of the testimony of the defendant. The material issue was, what was the real character of that transaction. The plaintiffs, by calling the defendant and proving by him that the intestate owed him nothing when the check was given, showed that the transaction was not a payment, and, by eliminating this element, characterized the transaction as a loan. If the question put to the defendant by the plaintiffs had been in a direct form as, for instance, "Was the check given for a debt?" no doubt could be entertained that the question would have been concerning the transaction between the parties when the check was given, and, if answered in the negative, the door would have been opened to the defendant to show what the transaction was, and that it was not a loan, which would be the presumption in the absence of further explanation. The mere form of the question can make no difference, if the question put, in substance, called for an affirmation or negation as to the character of the transaction in question. The point is the same in principle as if the defendant, not having been called as a witness by the plaintiffs, had offered himself as a witness in his own behalf, and, with a view of showing that the check was given in payment of a debt, had been asked "Was the intestate, on the day of the date of the check, indebted to you in the amount for which the check was given?" It is plain that he could not have been permitted to testify directly that he received the check in payment of a debt, or that it was not given as a loan, or that it was a gift, because this would be permitting him to testify what the transaction was. It is equally plain, we think, he could not have been permitted indirectly to

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accomplish the same end by permitting him to testify that when the check was given there was a debt owing him by the intestate of the same amount, thereby excluding the idea of a loan, and raising the inference that the transaction was a payment. He could not in this way be permitted to characterize the transaction, *i. e.*, to show what it was not, and to accomplish by indirection what he could not have done directly. The plaintiffs could not ask the defendant as their witness the same question, except at the risk of opening the whole transaction. They could not call the defendant and show by him that there was no debt and, consequently, that the transaction was not the payment of a debt, and preclude him from testifying as to what the transaction was, or that it was not that which the evidence given by him on their examination presumptively established it to have been.

There is difficulty in administering the rule declared in section 829. The survivor of one of two parties is not precluded by that section from testifying to any independent fact material to the litigation, that is, to any fact which does not involve the disclosure of a personal transaction or communication with the deceased, or is not *concerning* such personal transaction or communication. Every material fact tends, directly or indirectly to prove or disprove the issue to which it relates. But the survivor is not precluded from testifying in his own behalf to a material fact, simply because it may throw light upon and tend to prove or disprove the transaction in issue. The statute closes the lips of the survivor only as to personal dealings between the parties. It does not deprive him of the right to testify to any material fact known to him, not involving the disclosure of a personal transaction with the decedent, although such fact may indirectly prove or disprove a personal transaction upon which the suit is founded. In other words, the testimony of the survivor is not excluded because it bears upon the issue to be decided, or because it bears upon a personal transaction which is itself the subject of inquiry. It is excluded only when it is in effect a disclosure of what has occurred between the witness and the deceased in relation to

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the subject in controversy. If, in substance, the fact sought to be elicited respects a personal transaction and tends directly to disclose a personal transaction, or the presence or absence of some element in a personal transaction, then the fact is not, we think, an independent one, and the survivor is precluded from testifying to it, unless the way is opened by his examination by the other party. (*Tooley v. Bacon*, 70 N. Y. 34; *Maverick v. Marvel*, 90 id. 656; *Koehler v. Adler*, *supra*; *Lerche v. Brasher*, 104 N. Y. 157; *Clift v. Moses*, 112 id. 426.) The examination of the defendant by the plaintiffs, as to the existence of a debt between the witness and the intestate when the check was given, directly bore upon the nature and character of the transaction, and was an indirect method of proving the transaction itself. They thereby made the defendant a competent witness to testify in his own behalf as to the same transaction.

For the error of the trial court in rejecting the evidence of the defendant the judgment should be reversed.

All concur.

Judgment reversed.

113 589
126 675

GUSTAVUS SHEPARD, Appellant, v. REUBEN G. WRIGHT,
Respondent.

In an action upon a personal judgment of a Canada court the complaint alleged, as the ground of jurisdiction, that defendant appeared in the action. The answer denied this allegation and affirmatively alleged that the court had no jurisdiction to render the judgment, as defendant neither appeared in the action nor was served with process. Upon the trial plaintiff introduced the judgment record, which showed on its face that the service was made upon defendant at his residence within this state. *Held*, that the service was ineffectual to give the judgment validity here if defendant was not a citizen of Canada or domiciled within that jurisdiction; that defendant's place of residence is to be presumed his domicile, and nothing having been shown to rebut that presumption, the service was ineffectual and the judgment had no validity here.

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No rule of comity requires this court to give effect to a personal judgment rendered under a foreign law where, on the face of the record, it appears that jurisdiction of the person of the defendant was not obtained.

Reported below, 35 Hun, 444.

(Submitted April 23, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 4, 1885, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term. This action was upon an alleged judgment.

The material facts are stated in the opinion.

G. W. Cotterill for appellant. In declaring upon a judgment of a court of general jurisdiction, whether domestic or foreign, it is and was only necessary to allege generally that the plaintiff impleaded the defendant, and by the consideration of the court recovered judgment. It is not necessary to aver even that the court had jurisdiction. The presumption is conclusive that all the requisite prior proceedings were had, until the contrary appears. (*Chitty on Pleading*, 354; *Biddle v. Wilkins*, 1 Peters, 686; *Freeman on Judgments*, §§ 132, 452, 453; *Shumway v. Stillman*, 4 Cow. 296; *Foot v. Stevens*, 17 Wend. 486; *Stockwell v. McCracken*, 109 Mass. 86; *Wheeler v. Raymond*, 8 Cow. 311; 1 Kent's Com. 261, note; *Cowen v. Braidwood*, 9 Dowl. Pr. Cas. 33.) The defendant should have alleged and proved that he was not a citizen of Canada, nor domiciled there, nor amenable to its laws during any period of time between the commencement of the action and the rendition of the judgment. (*Huntley v. Barker*, 33 Hun, 578, 581, 582.) Two things must concur to constitute domicile, first, residence; and, secondly, the intention of making it the home of the party. (*Story on Conflict of Laws*, § 44.) The claim upon which this judgment is based should be enforced *ex comitate* and *ex necessitate* as a judgment *prima facie*, leaving the defendant to answer on the merits. (*Hendrick v. Whittlemore*, 105 Mass. 29; *Henderson v. Staniford*, Id. 506; *Merwin v. Kneubel*, 23 Wend. 293; *Baxter v. Drake*, 85 N. Y. 504.) The alleged doctrine that

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service of process is confined to state lines, if it ever existed, is opposed to principle, practice and progress. (Bigelow on Estoppel [2d. ed.] 224; *Moore v. Wayne*, 18 Rep. 760; *Holmes v. Remsen*, 4 Johns. Ch. 460; *Embree v. Hanna*, 5 Johns. 101; Code, §§ 435, 436.) Where a citizen of New York purchases, occupies and enjoys real estate in Canada, and does not pay for it, a judgment obtained against him by service in this state should be *prima facie* evidence of his liability, leaving him to plead or make proof to the merits in the courts of this state. (*Cowen v. Braidwood*, 1 M. & G. 882; *Manbouquet v. Wyse*, 1 Irish Rep., C. L. S. 471; *Taylor v. Bryden*, 8 Johns. 173; *King v. Gilder*, 1 D. Chip. 345; *Lewis v. Westcott*, 26 N. Y. 147.)

Luther R. Marsh for respondent. The Canadian judgment sued on not having been obtained upon any service of process on the defendant in the dominion of Canada, or upon any voluntary appearance therein by the defendant, was not a judgment upon which an action could be maintained in the state of New York. (*Gibbs v. Q. Ins. Co.*, 63 N. Y. 114, 124; *Schwinger v. Hickok*, 53 id. 280; *Freeman v. Alderson*, 119 U. S. 185, 186; *Cooper v. Reynolds*, 10 Wall. 368; *Pennoyer v. Neff*, 95 U. S. 714, 723.) If the record of a judgment of a court of a sister state omits a statement of facts necessary to give the court jurisdiction of the person of the defendant, and it is sought to be enforced in this state by an action founded upon it, no credit can be given to such judgment, and it will be regarded as a nullity. (*Noyes v. Butler*, 6 Barb. 607, 617; *Anderson v. Haddon*, 33 Hun, 438, 439, 441.) Comity has never been stretched so far as to recognize a foreign judgment as a personal one, where the court rendering it never had any jurisdiction of the person of the defendant. (*Pennoyer v. Neff*, 95 U. S. 714.)

FINCH, J. The judgment upon which this action was brought appears to have been rendered in the dominion of Canada by the Court of Chancery for Ontario, and is a personal judgment

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against the defendant. The record shows that he did not appear in the action, and discloses as the ground of jurisdiction over his person the service of process upon him at his place of residence in this state. It is beyond question that such service was ineffectual to give the judgment validity here if the defendant was not a citizen of Canada or domiciled within that jurisdiction. (*Schwinger v. Hickok*, 53 N. Y. 280; *Gibbs v. Queen Ins. Co.*, 63 id. 114; *Pennoyer v. Neff*, 95 U. S. 714; *Freeman v. Alderson*, 119 id. 185.) The contention of the appellant is that the Court of Chancery for Ontario was shown to be a court of general jurisdiction whose judgment stood presumptively valid until some defect was shown, and the defendant should have alleged and proved that he was not a citizen of Canada when the service was made nor domiciled there. The question thus becomes one of pleading and proof. The complaint alleged as the ground of jurisdiction by the Canadian court that the defendant appeared in the action and averred no other. The answer of the defendant denied this allegation, and affirmatively alleged that the Canadian court had no jurisdiction to render the judgment against him, because he neither appeared in the action nor was process served upon him in Canada. When this issue came to trial the plaintiff introduced the record, and that showed on its face that the service was made upon the defendant at his residence within this state. But, argues the plaintiff, there is a difference between residence and domicile, and the defendant, although residing in this state, may have had his domicile in and have been a citizen of the Dominion. Assuming that there may be such a difference, yet the place of residence is the domicile, unless something is shown to vary the ordinary and general rule. Here the record shows residence in this state at the date of the service. That residence is also to be deemed the domicile until some facts are shown to negative the inference. None such appeared, and we cannot presume or imagine them in the face of the fact shown, from which the natural inference is that the defendant's domicile was in this

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state within which he resided. No rule of comity requires us to give effect to a personal judgment rendered under a foreign law where, on the face of the record, it appears that jurisdiction of the person was not obtained.

The judgment was right and should be affirmed, with costs. All concur.

Judgment affirmed.

WILLIAM P. WILLIS et al., Respondents, v. AURELIUS S. SHARP, as Executor, etc., Appellant.

It seems the intention of a testator to confer on his executor power to continue a trade or business will not be deemed to have been conferred unless it is found in the direct, explicit and unequivocal language of the will.

It seems, also, that when the power *simpliciter* is conferred, it only authorizes the use of the fund invested in the business at the time of the testator's death; the general assets may not be used unless such an intent on the part of the testator is expressed in the will.

When such an intent does not appear a creditor has no remedy except to pursue the assets embarked in the trade or business at the time of the death.

A testator may, however, bind his general assets for all of the debts; and where such an intent finds expression in his will, in case of the insolvency of the executor, the general assets may be made liable in equity for the debts.

The will of S., after providing for the payment of debts, etc., gave all her property to her executors, in trust, to apply the income therefrom to the education and maintenance of her only son until he should arrive at the age of twenty-five years, the property and accumulations to be then divided equally between her son and husband, with cross-remainders in case of the death of either prior to the time of division. She directed that after her death some legitimate business should be carried on by her executors for the benefit of her son, of which her husband should be retained as manager at a yearly salary. Then followed this provision. "I do hereby authorize and empower my executors to sell or make such other disposition of my real and personal estate as the safe conduct of such business shall seem to them to require." The testatrix at the time of her death was engaged in the merchant tailoring business, which was carried on by defendant, her husband; he was one of the executors and alone qualified, and continued the business after the death of his wife.

113	586
115	336
115	337
113	586
135	434

118	586
155	865

113	586
167	85

113	586
168	1687

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Plaintiffs sold and delivered to defendant, as executor, certain goods for the purposes of said business. In an action to compel defendant to pay the purchase-price of the goods out of the assets of the estate in his hands the complaint set forth the foregoing facts, and alleged that, individually, he was irresponsible. *Held*, that plaintiffs were entitled to the relief sought; that the provisions of the will indicated unmistakably an intention on the part of the testatrix to subject her general assets to the debts of the business and to authorize her executors to contract debts therein binding her general estate.

Reported below, 43 Hun, 434.

(Argued April 22, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 15, 1887, which affirmed a judgment in favor of plaintiffs, overruling a demurrer to the complaint.

This action was brought against defendant as executor of the will of his deceased wife, to recover for goods alleged to have been sold and delivered to him as such.

The facts are sufficiently stated in the opinion.

Alexander V. Campbell for appellant. Plaintiffs could not maintain their action in a court of law. (*Reynolds v. Reynolds*, 3 Wend. 244; *Ferrin v. Myrick*, 41 N. Y. 315, 322; 53 Barb. 76; *Austin v. Munro*, 47 N. Y. 360.)

Walter S. Logan for respondents. The demurrer being upon the sole ground that the complaint does not state facts sufficient to constitute a cause of action, all other defects, if any exist, are waived. (Code, § 488; *People ex rel. Lord v. Crooks*, 53 N. Y. 648.) On demurrer all reasonable intendments will be indulged in favor of the pleading demurred to. (*Lorillard v. Clyde*, 86 N. Y. 384.) The court, under the circumstances, can and will do, or consider as done, that which ought to be done, and will, in some way, see that the fund which ought to be applied in payment for the goods which the estate has received is so applied. (Willard's Eq. Jur. 48, 49.) The direction in the will that the business be carried on by the executors is a valid provision. (*White v. Miller*, 71 N. Y. 127; *Ex parte Richardson*, 1 Buck. 202; *Ex parte Garland*,

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10 Ves. 119.) Although an administrator cannot bind the estate by an executory contract, nor create a future liability not founded upon the contract or obligation of his intestate, yet relief may, in a proper case, be given in equity by applying funds of the estate to the discharge of an obligation entered into in good faith by the administrator on behalf of the estate, no other remedy being open to the plaintiff. (*Thompson v. Smith*, 64 N. H. 412.) The case is properly brought against the executor as such. (Code, § 1814.)

ANDREWS, J. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. This presents solely the question whether, upon the facts stated, a case was made for legal or equitable relief against the estate which he represents. The question whether other parties interested in the estate, either as creditors or as legatees or devisees, should have been joined as defendants does not arise. They will not be concluded except so far as the executor may be deemed to represent their interests, and the defendant, not having taken any objection on the ground of defect of parties, is deemed to have waived it (Code, § 499.)

It appears from the complaint that, on or prior to April 28, 1885, Fida C. Sharp died leaving a will of real and personal estate, whereby she devised and bequeathed all her property to Aurelius S. Sharp (her husband), and Elsie Sharp, as executors, in trust to apply the income therefrom, or such portion thereof as they should deem just, to the education, support and maintenance of her son Harry, until he should arrive at the age of twenty-five years, and then to divide the property and accumulations between her son and her husband, share and share alike, with cross remainders in case of the death of either prior to the time of division. She directed that after her death some legitimate business should be carried on by her executors for the benefit of her son Harry, and that her husband, the defendant, should be retained as manager thereof at a salary of \$1,500 a year, and this was followed by

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a provision empowering her executors "to sell or make such other disposition of my real and personal estate as the safe conduct of such business shall seem to require." Her husband and her son Harry were the sole beneficiaries under the will, there being no legacies or provisions in favor of any other persons, except that the testatrix directed that her debts and funeral and testamentary expenses should be paid as soon as practicable after her decease. The testatrix, at and for a long time prior to her death, was engaged in the merchant tailoring business in the city of New York, and after her death the same business was carried on by her husband, as executor, under the power contained in the will, he alone having qualified as executor. Between the 15th of July, 1885, and the 15th of October, 1885, the plaintiffs sold and delivered to the defendant, as executor, for the purposes of said business, goods for the price and of the value of \$1,380.73, which goods the complaint alleges were necessary for the conduct and carrying on of the business, and were purchased and used by the defendant for that purpose, and that "the estate of said Fida C. Sharp has had the full benefit thereof." It alleges that no part of the purchase-price of the goods, except the sum of \$65, had been paid; that the defendant, individually, is irresponsible; and that the plaintiffs have no recourse for the payment of their debt, except the same can be paid out of the funds of the estate in the hands of the executor, which, it is alleged, are sufficient for that purpose, and that the defendant has neglected and refused on demand to pay for said goods. The relief demanded is a judgment against the executor, requiring him to pay the debt out of funds and property of the estate in his hands, and for general relief.

By the general rule the death of a trader puts an end to any trade in which he was engaged at the time of his death, and an executor or administrator has no authority *virtute officii* to continue it, except for the temporary purpose of converting the assets employed in the trade into money. (*Barker v. Parker*, 1 T. R. 287; 2 Williams on Exrs. [7th ed.] 791.) But a testator may authorize or direct his executor to continue a

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trade or to employ his assets in trade or business, and such authority or direction, if strictly pursued, will protect the executor from responsibility to those claiming under the will, in case of loss happening without his fault or negligence, and also entitle him to indemnity out of the estate, for any liability lawfully incurred within the scope of the power. (*Burnell v. Canwood*, 2 How. [U. S.] 560; *Laible v. Ferry*, 32 N. J. Eq. 791; *Scott v. Izon*, 34 Beav. 434; *Lucas v. Williams*, 39 Gif. 150.) The courts, while they have sustained with substantial unanimity the validity of a direction of a testator in his will that his trade should be continued, whether his business was that of a sole trader or of a firm of which he was a member, have applied stringent rules of construction in ascertaining both the existence and extent of the authority of the executor. In the first place, the intention of a testator to confer upon an executor power to continue a trade must be found in the direct, explicit and unequivocal language of the will or else it will not be deemed to have been conferred (*Burnell v. Canwood*, *supra*; *Kirkman v. Booth*, 11 Beav. 273), and in the next place, a power, *simpliciter*, to carry on the testator's trade, or to continue his business in a firm of which he was a partner, without anything more, will be construed as an authority simply to carry on the trade or business with the fund already invested in it at the time of the testator's death, and to subject that fund only to the hazards of the trade and not the general assets of the estate. (*Ex parte Garland*, 10 Ves. 119; *Cutbush v. Cutbush*, 1 Beav. 184; *Ex parte Richardson*, 1 Buck. 202; *M'Neillie v. Acton*, 4 De G., M. & G. 742.) The property already embarked in the business is the trade fund, unless it appears from the will that the executor was authorized to use the general assets in the business. In every case where a trade is carried on by an executor under authority of the will, questions may arise as to the respective rights of existing and subsequent creditors, that is, creditors of the testator and creditors of the trade whose debts were contracted in the business carried on by the executor. The creditors of the testator, under our statute and the general rule of law for

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the administration of assets of a decedent, are entitled to have the assets collected in and applied upon their debts, a reasonable time being allowed for the ascertainment of the debts and the conversion of the assets. It would seem that a direction of the testator that his business should be continued would not be allowed to interfere with this right of existing creditors, or put to hazard the property of the testator applicable to the payment of their debts. (*Stanwood v. Owen*, 14 Gray, 195.) But this question is not presented by any facts appearing in this case. It does not appear that there were any debts owing by the testatrix at her death, or if there were such debts, that they have not been fully paid. The debt of the plaintiffs was contracted with the executor. It is the settled doctrine of the courts of common law that a debt contracted by an executor after the death of his testator, although contracted by him as executor, binds him individually, and does not bind the estate which he represents, notwithstanding it may have been contracted for the benefit of the estate. (*Austin v. Monro*, 47 N. Y. 360.) It has been held in numerous cases that an executor, carrying on a trade under the authority of the will, binds himself individually by his contracts in the trade. He is not bound to carry on the trade and incur this hazard, although authorized or directed to do so; but if he does carry it on, the contracts of the business are his individual contracts. (*Ex parte Garland*, *supra*; *Fairland v. Percy*, L. R., 3 P. & D. 217; *Labouchere v. Tupper*, 11 Moore's P. C. 198; *Downs v. Collins*, 6 Hare, 418.) If, in this case, there was in the will simply an authority or direction to the executors to carry on a trade, and in pursuance of the power the executor continued the existing business, we think, under the authorities cited, the plaintiffs could have no remedy, except to pursue the assets embarked in the trade at the death of the testatrix. But, as said by STORRY, J., in *Burwell v. Canwood*, a testator may, if he chooses, bind his general assets for all the debts of a business to be carried on after his death. Where this was the intention of the testator expressed in the will, then, in

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case of the insolvency of the executor, we see no reason to doubt that, in equity, the general assets become liable for the debts of the business. In *Fairland v. Percy* (*supra*), Sir J. HANNAN states the principle. He says: "Where a testator, by his will, directs that his business may be carried on, and that his personal estate shall be used as capital with which to do so, the persons who, after his death, become creditors of the business, in addition to the personal responsibility of the individuals who gave the order for the goods, or otherwise contracted the debt, are entitled in equity to claim against the estate to the extent that he authorized it to be used in that business." (See *Owen v. Delamere*, L. R., 15 Eq. 134.)

The provision in the will of Mrs. Sharp, empowering her executors to "sell or make such other disposition of my real and personal estate as the safe conduct of such business shall seem to require," indicates, we think, unmistakably, an intention on her part to subject her general assets to the debts of the business and to authorize the executor to contract debts therein binding her general estate. The executor could, unquestionably, have withdrawn from the assets money to purchase the goods, and a purchase on credit was, we think, a pledge of the general assets for their payment.

We are of the opinion that the complaint, on its face, stated a cause of action in equity, and we, therefore, affirm the judgment below.

All concur.

Judgment affirmed.

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MARSHALL CUTLER et al., Respondents, v. THE AMERICAN EXCHANGE NATIONAL BANK, Appellant.

Plaintiffs paid into defendant's bank \$500 upon its promise to remit that sum for them to H. at Leadville, Col., receiving a "letter of advice" signed by defendant's cashier, directed to a Leadville bank, which stated that the account of that bank was credited that day with \$500 "received from" plaintiffs "for the use of" H. Plaintiffs forwarded this letter to H., but before its receipt the Leadville bank had failed and a receiver had been appointed, who refused to pay the money. Plaintiffs, on return of the letter, demanded of defendant that it carry out its agreement or refund the money, and upon its refusal, brought this action to recover the same. *Held*, that defendant received the money as a special deposit and was bound to retain it until drawn out under authority of the letter; that by its contract it agreed, in substance, that the Leadville bank would pay the amount on presentation of the letter, and when payment was refused and the letter returned, it became at once liable to repay the money to plaintiffs; that the words in the letter that the Leadville bank's "account is credited" with the money were controlled in their general application by the remainder of the clause, *i. e.*, that it was "for the use of" H.; that no contractual relations existed between plaintiffs and the Leadville bank, and no obligation was imposed upon it until it adopted the defendant's act or in some manner assumed the obligation; that the fact that defendant was its correspondent and maintained an account with it did not affect the question.

Reported below, 21 J. & S. 168.

(Argued April 23, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made the first Monday of June, 1886, which affirmed a judgment in favor of plaintiffs, entered upon a verdict directed by the court.

This action was brought to recover the sum of \$500 alleged to have been deposited with defendant by plaintiffs.

The plaintiffs were depositors with the defendant bank. Desiring to remit a sum of money to one Hall, in Leadville, Col., they asked of the defendant's officers if they could do it for them. They said they could, but refused to give the

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plaintiffs a draft on a bank in Leadville, saying they could not do that, but they would give plaintiffs a letter of advice which, as they stated, was their way of doing business. To this plan plaintiffs assented and paid into the defendant the sum of \$500. They then received back from the defendant the following writing:

"NEW YORK, *July 20*, 1883. }
"BANK OF LEADVILLE, LEADVILLE, COLORADO. }

"Your account is credited this day \$500, received from Cutler, Hall & Co., for the use of J. Seymour Hall.

"E. BURNS, *Cashier*."

Plaintiffs forwarded this letter to Hall, but before he received it the Leadville bank had failed and had gone into a receiver's hands, who refused to pay any money. Plaintiffs thereupon received back the letter and then demanded that the defendant carry out their undertaking to transmit the money to Hall or to pay back the money. Upon its refusal this action was brought.

The facts are sufficiently stated in the opinion.

L. B. Bunnell for appellant. This was not a special deposit for a particular purpose, the identical fund to be returned, but a deposit, generally, for credit in the account of the Bank of Leadville to be paid by the Bank of Leadville to a particular party. (*Boyden v. Bk. of Cape Fear*, 65 N. C. 16; *Marsh v. O. C. Bk.*, 34 Barb. 298; *Commercial Bk. v. Hughes*, 17 Wend. 94.) A letter containing information of any circumstance unknown to the person to whom it is written, generally informing him of some action by the writer, is a letter of advice. (*Chitty on Bills*, 165.) This letter was no part of the contract between the parties. It was evidence, however, of what the parties had done, and to the Bank of Leadville it amounted to a mere notice of that fact. The transaction would have been the same if it had not been given. (*Guillaume v. G. T. Co.*, 100 N. Y. 498; *Williams v. Deacon*,

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4 Exch. Ch. 401.) The right of action for this money is against the Bank of Leadville. (*People v. State Bk.*, 36 Hun, 609.) The defendant became the agent of the Bank of Leadville in respect of these deposits. (*Butler v. Harrison*, Cowp. 565.)

Dudley R. Horton for respondents. Defendant had no right to reduce the indebtedness of the Leadville bank to it by the application of this special deposit. (*Dows v. Kidder*, 84 N. Y. 121; *Falkland v. S. N. Nat. Bk.*, Id. 145; *D. N. Bk. v. O'Hare*, 119 Ill. 646; *Corpen v. Hall*, 29 id. 512; *Nimbus v. Campbell*, 3 Gil. 502; *Savgs. Bk. v. Wade*, 11 U. S. 195; Wharton on Cont. 784, 787; *City of St. Louis v. Johnson*, 5 Dill, 241; *Farley v. Turner*, 26 L. J. & T. 10.) The issuing of a letter of advice is a certification of the foreign bank's account. (*Cooke v. State Nat. Bk.*, 52 N. Y. 96; *Freund v. I. and T. Nat. Bk.*, 76 id. 352.) The transaction was in the nature of a special deposit. (*Drovers' Nat. Bk. v. O'Hare*, 119 Ill. 646; *M. Nat. Bk. v. Loyd*, 90 N. Y. 533; *Van Leuwen v. F. Nat. Bk.*, 54 id. 671.) The defendant was the agent or trustee of the plaintiff, not of the Bank of Leadville. (*People v. City Bk. of Rochester*, 96 N. Y. 32.) Plaintiffs are not estopped by the wording of the letter of advice. (*D. Nat. Bk. v. O'Hara*, 119 Ill. 646; *Van Alen v. A. N. Bk.*, 52 N. Y. 1; 2 Gratt. 544; *Pennell v. Deffell*, 4 De Gex, M. & G. 372; 6 Jones Eq. 34; 2 H. & M. 417; 2 Kent's Com. 796, 801.) The defendant bank is liable for the default of its correspondent. (*Allen v. Merchants' Bk.*, 22 Wend. 215; *Ayrault v. Pacific Bk.*, 47 N. Y. 570; *Reeves v. State Bk.*, 8 Ohio, 460; *Titus v. Merchants' Nat. Bk.*, 35 N. J. L. 588; *Abbott v. Smith*, 4 Ind. 452; *Tyson v. State Bk.*, 6 Blackf. 225; *Mackersy v. Ramsays*, 9 Cl. & F. 818.) As the Bank of Leadville could not have been compelled to pay upon the letter of advice, defendant must. (*Dickerson v. Wason*, 47 N. Y. 439.) Unless the fund came into the hands of the Bank of Leadville or its receiver, defendant must repay plaintiffs. (*People v.*

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M. and M. Bk. of Troy, 78 N. Y. 269; *Dows v. Kidder*, 84 id. 121; *Falkland v. S. N. Nat. Bk.*, Id. 145.)

GRAY, J. This appeal turns upon the understanding and agreement between these parties. That they made a distinct compact is not to be doubted, and the plaintiff's construction of it seems to us as logical as it is natural. The agreement must control the respective rights and duties, and it is to be determined by what was said and done between the parties, when the plaintiffs paid their money to the defendant. The plaintiffs wished to make a payment to a certain person, in a distant state, and the defendant undertook to effect it for them in its own way. When the plaintiffs assented and paid in the sum desired to be remitted, they received the paper writing in question. From that moment the defendant became a depositary of a fund, which was, by its own agreement, devoted to one particular purpose and to no other. If that purpose failed, or became incapable of being effectuated, or was recalled by the plaintiffs, the absolute right to the moneys was in them and in no one else. The defendant's undertaking was to effect the payment of the sum deposited by plaintiffs to Hall, and at no time did the moneys become merged in the general funds of the defendant, or cease to be under its dominion for the purpose of its assumed agency. Its so-called letter of advice was equivalent to its certificate to its western correspondent of the deposit of a sum of money by the plaintiffs, for the use of the person mentioned therein. The paper was worthless in the hands of any person, until it was accepted by the Leadville bank, to which it was addressed. By its contract the defendant agreed with the plaintiffs, in effect, that the Leadville bank would pay \$500 to Hall upon the presentation of its letter of advice. When that payment was refused and the letter of advice was returned to the plaintiffs, the defendant became at once liable to repay the money to the plaintiffs.

The defendant seeks to avoid what seems to be this very plain liability on its part, on the ground that by crediting

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the sum to the Leadville bank's account on its books, the defendant became a debtor to that bank for the money, and that the plaintiffs had assented that it should be so credited. But that was not the agreement, and no such construction is possible. The plaintiffs paid the money to defendant as a conduit for its transmission to Hall, and its undertaking was that Hall should get it. The letter of advice, which plaintiffs received, by its terms, limited the use of the money to him alone. The defendant became the special depository of the fund, and bound itself to retain it, until drawn out under the authority of the letter. The letter was Hall's warrant for demanding payment of the bank to which it was addressed, and, upon payment, became the bank's voucher for reimbursement by the defendant. The form of the writing in question is not material, if its meaning is unobstructed and clear. In stating therein that the foreign bank's "account is credited" with the money, those words were controlled in their general application and sense by the remainder of the clause, that it was "for the use of Hall." Thus the meaning of the instrument was obvious to the plaintiffs, to Hall and to the foreign bank. It evidenced a special deposit made by plaintiffs, and warranted and protected the foreign bank in paying the sum mentioned to Hall upon its production and surrender.

The appellant argues that, by the deposit of the money and by passing it to the credit of the account of the Leadville bank, a promise to pay the sum was implied by law on the part of that bank. That proposition, of necessity, involves the idea that, actually or constructively, the foreign bank became a party to the arrangement in New York; and, also, that the plaintiffs in some way consented to its substitution for the defendant in the performance of the engagement entered into.

As there was an express contract made with plaintiffs by defendant to do the particular thing, the defendant must be bound by its terms and legal effect. As we have said, the compact was clear enough, and whatever forms the defendant went through, it would not be allowed to change it, or to divert the moneys to any other purpose or use. And yet

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that is what it is striving for in its present contention. If allowed to be applied on account of the foreign bank's indebtedness, as would be the effect if we should hold that the credit on the books of the defendant to its account passed the title to the moneys, to that extent the defendant would be the gainer and the plaintiffs would be the losers, by being remitted to a claim upon the receiver of the insolvent foreign bank. But the claim of the defendant, that the Leadville bank became a party to, or bound by, the transaction in question, is quite untenable, in the absence of any evidence of its assent, or of some act on its part equivalent to the assumption of the obligation. Here was an express agreement entered into between these parties for the accomplishment of a particular purpose, and to which the money paid to the defendant was dedicated from the moment of its receipt. No contractual relations existed between the plaintiffs and the foreign bank. They were strangers to each other. That bank did not know of the transaction, and the contractual elements of mutuality, or of assent, were wholly wanting. No duty was imposed upon it, and it could come under no obligation until it adopted the defendant's act. How, then, can it be argued that some obligation on its part was implied by the law? And can it be seriously contended that the law implied on plaintiffs' part that they looked to and relied upon the promise of the Leadville bank? I think that would be carrying the idea of implied contracts to an unknown and unwarranted extent.

The relations of correspondence between defendant and the Leadville bank enabled such an arrangement to be made; but the fact of the defendant being a correspondent and maintaining an account with the Leadville bank in no wise affects the case. The defendant did not say in its letter that the account of the Leadville bank was credited generally with the moneys. The advice to it was of a deposit to its credit for a particular and designated purpose, namely, for the use of Hall. If the defendant had become insolvent, the next day after the transaction, would the Leadville bank have been the loser, as to the money, or the plaintiffs? It seems pretty plain

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that the loss would have been the plaintiffs'; inasmuch as the Leadville bank had not become bound to anything, expressly or impliedly. The argument of the appellant fails to appreciate the legal effect of the transaction between these parties. The deposit was a special one, for a designated beneficiary and could not be used or dedicated by the defendant to any other purpose. No system of bookkeeping entries would be allowed to cause the plain agreement of the parties to miscarry; either with respect to a payment to Hall, or to its return to the depositors, in the event of the failure of the defendant to cause such payment.

The case of *Drovers' Bank v. O'Hare* (119 Ill. 646), was not unlike the present one in its features, and the conclusions of the court were that the owner of the fund deposited must receive it back. In that case the Drover's Bank gave to the agents of one O'Hare, depositing a sum of money to the credit of the Henry Bank for the use of said O'Hare, its certificate that the amount had been carried to the credit of the Henry Bank for the use of O'Hare. The Henry Bank failed the same day; but the Drovers' Bank transferred the sum to the N. W. Bank to the credit of the Henry Bank, without mentioning for what use the funds had been deposited with it. The N. W. Bank carried the moneys to the account of the Henry Bank and applied them upon the indebtedness due it from that bank and refused to account to O'Hare for the moneys. The court held that the Drovers' Bank received and held the funds to the use of O'Hare and must account to him for the same.

The opinion of the court below, at General Term, upon a first trial of this action, was well considered, and a more extended expression of our views seems uncalled for.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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118	600
152	287

118	600
152	188
118	600
155	591

LOUISA WEBER, as Administratrix, etc., Appellant, v. HERBERT
L. BRIDGMAN et al., Respondents.

The authority of an agent authorized to collect and receive payment upon securities belonging to his principal, when it is not coupled with an interest, ceases upon the death of the principal, and a payment thereafter made to the agent does not bind the estate of the principal, although the payor was not aware of the death at the time of making the payment; nor does the fact that the agent at the time of payment held the security affect the rights of the principal.

In 1871 W. executed to H. a power of attorney, authorizing him, among other things, to collect and receive moneys becoming due from any person to his principal and to execute discharges therefor, etc. H. purchased a bond and mortgage, receiving an assignment thereof to W., and as agent collected the interest thereon as it fell due, receipting therefor in the name of W. The latter died in Germany in January, 1874. The bond fell due in May of that year and was paid by B., the then owner of the mortgaged premises, to H., who executed a satisfaction of the mortgage and delivered to the payor the bond and mortgage, the assignment and the power of attorney. H. knew at the time of the death of W., but he did not disclose the fact to B. and the latter made no inquiries. In an action brought in 1885 to foreclose the mortgage the court found that H. never accounted to plaintiff, administratrix of W., for the bond and mortgage or the proceeds, and that plaintiff never assented to or ratified the payment, and did not know of the existence of the bond and mortgage or the cancellation thereof until within a short time of the commencement of the action. *Held*, that the payment was invalid, and in the absence of evidence that the personal representatives of the decedent assented or ratified it, was no defense; that the fact that H. had possession of the securities did not affect the question, as B. had full notice of the extent of and limit to the authority of H.

(Argued April 24, 1889; decided June 4, 1889.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 14, 1887, which reversed a judgment in favor of the plaintiff, entered upon a decision of the court on trial at Special Term and ordered a new trial.

This action was for the foreclosure of a mortgage executed by James Dunn to Thomas Bierds, covering premises situated on Carlton avenue, Brooklyn, as security for the payment of his bond of \$2,000, dated May 9, 1872. It was assigned to

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Paul Weber. He died intestate. On the 4th of June, 1874, the plaintiff, Louisa Weber, his widow, was appointed administratrix of his estate, and on July 1, 1886, commenced this action. James Dunn was made defendant, but did not appear. The other defendants were made parties as having an interest in the premises subsequent to the lien of the mortgage. Defendant Adams answered. He alleged that on the application of one Herbert Bridgman he loaned him, April 19, 1880, and February 21, 1884, certain sums of moneys on his bond, secured by mortgages of those dates on the premises described in the complaint; that at the time of each transaction Bridgman was the lawful owner of the property in fee simple. The defendant Bridgman claims to be the owner of the premises. Both the defendants aver that the mortgage in suit was paid to the then holder and duly satisfied of record May 13, 1874.

The trial judge found in favor of the plaintiff and directed the usual judgment of foreclosure and sale. The General Term, upon the defendant's appeal, reversed the judgment "upon questions of fact and questions of law." The question of fact litigated upon the trial arose upon the defense of payment. It appeared, to the satisfaction of the trial judge, that Paul Weber, then residing in New York, but about to visit Europe with his wife and family, did, on June 6, 1871, execute to one August Hartwig a power of attorney under seal, authorizing him in these words, "to demand, ask, sue for, collect and receive all sums of money, debts, rents, dues, accounts, interest on bond and mortgage, and other demands, of every kind, nature, description whatsoever which are or may become due, owing or payable to me from any person or persons whomsoever, and to give good and sufficient receipts, acquittances and discharge therefor, giving and granting unto my said attorney full power to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and con-

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firming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof." Weber acknowledged this instrument so as to entitle it to be recorded. He remained absent from New York, and died in Germany January 11, 1874. During his absence Hartwig bought for him the bond and mortgage in question, taking an assignment to Paul Weber, and, after record, held possession of said bond, mortgage and assignment till May 12, 1874, collected and receipted for, in Paul Weber's name, the semi-annual interest as follows:

October 9, 1872, of James and Bridget Dunn, the then owners.....	\$70
June 9, 1873, of James and Bridget Dunn, the then owners.....	70
December 2, 1873, of James and Bridget Dunn, the then owners	70

and endorsed the same on the bond.

On April 23, 1874, Bridgman acquired title to the premises and assumed payment of the mortgage. It became due May 9, 1874, and was paid by him by check to Hartwig May 12, 1874, and a discharge was given by Hartwig as attorney for Weber. At the same time the bond and mortgage, the assignment to Weber and the power of attorney were delivered to Bridgman. Hartwig, during all this transaction, knew of the death of Weber, having been informed of it as early as the 1st of February, 1874, but he did not disclose that fact to Bridgman. But the trial judge also finds that Bridgman made no inquiry "as to the whereabouts of the principal, Paul Weber, or whether he was dead or alive."

Mrs. Weber returned from Europe on the twenty-second or twenty-fourth of May. The trial judge also found that Hartwig never accounted to the plaintiff for the bond and mortgage or its proceeds, nor for the assets in his hands, nor did he pay her any money; that plaintiff never ratified the act of Hartwig in canceling said mortgage; that she had no notice of the existence of said bond and mortgage or the cancellation

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thereof, and never knew of the cancellation until within a short time before the commencement of this action; that said Hartwig left no record of it, nor ever informed plaintiff of its existence or cancellation; that said mortgage is wholly unpaid, and remains unimpaired as a valid and subsisting lien by reason of any act of the plaintiff or her duly authorized agent.

As conclusion of law, he held that the agency of Hartwig terminated with the life of Paul Weber, and that the satisfaction of the mortgage was invalid and void.

Further facts appear in the opinion.

Alex. S. Bacon for appellant. Hartwig's agency terminated at his principal's death. (*Megary v. Funtis*, 5 Sandf. 376; *Hunt v. Rousmanier* 8 Wheat. 174; *Hess v. Rau*, 95 N. Y. 359; *Helmer v. St. John*, 8 Hun, 166.) Payment to an agent after his principal's death is not valid when the agent acts in bad faith and with knowledge of the principal's death, and the payor acts without notice of such death, but without making inquiries concerning it. (2 Kent's Com. [12th ed.] 646, 647; *Hunt v. Rousmanier*, 8 Wheat. 174; *Hess v. Rau*, 95 N. Y. 359; Story on Agency [9th ed.] § 488; *Davis v. Windsor Sav. Bk.*, 46 Vt. 728; *Jenkins v. Atkins*, 34 Am. Dec. 648; *Rigs v. Cage*, 37 id. 559; *Goet v. Galloway*, 4 Pet. 331; *Clayton v. Merritt*, 52 Miss. 353; *Cleveland v. Williams*, 29 Tex. 204; *Mich. Ins. Co. v. Leavenworth*, 30 Vt. 11; *Travers v. Crane*, 12 Cal. 12.) The defendants were guilty of negligence; it was their duty to make inquiries to learn whether Hartwig's power of attorney was still in force. (*Nixon v. Palmer*, 8 N. Y. 398, 400.) The burden rests on the defendants to show a ratification on Mrs. Weber's part. Nothing short of a valid ratification will suffice for a defense to this action in foreclosure. (*Nixon v. Palmer*, 8 N. Y. 398; *Seymour v. Wyckoff*, 10 id. 213, 224; *Owings v. Hull*, 9 Pet. 607, 629; *Ben v. Cunningham*, 3 id. 69; *Ritch v. Smith*, 82 N. Y. 627.)

Thomas H. Rodman for respondents. The payment by Bridgman, May 12, 1874, to Hartwig, as Weber's attorney,

acting under his written power, with the bond, mortgage and assignment in his hands, was a valid payment, although Weber was then dead; and in equity discharged the mortgage, irrespective of the effect to be given to the satisfaction piece executed by the agent at the time. (*Ex parte Snowball, In re Douglas*, L. R., 7 Ch. 548; *Hovel v. Lethwaite*, 5 Esp. 158; *Salte v. Field*, 5 T. R. 214; *Hazard v. Treadwell*, Strange, 506; 12 Mod. 347; *Hunt v. Rousmanier*, 8 Wheat. 174; Story on Agency, 646, note c.; *Lewis v. Kerr*, 17 Iowa, 73; *Dick v. Page*, 17 Mo. 234.) This is a stale demand which a court of equity will not favor. (*Sheldon H. B. Co. v. Eickemeyer H. B. Co.*, 90 N. Y. 607.)

DANFORTH J It should be assumed, without argument, that the plaintiff is not bound by the act of Hartwig, unless his authority to receive the money and discharge the mortgage was established, or unless she has, with knowledge of the facts, recognized that transaction and adopted it. The respondents' contention is that both alternatives are established, viz.: That the payment to Hartwig was a valid payment, and also that Hartwig accounted with the plaintiff and paid over to her the money so received by him. As Bridgman dealt with Hartwig as an agent, and now seeks to charge the representative of Weber as if his dealing had been with the principal, the burden of proof was on him to show either that the agency existed, and that the agent with whom he dealt had the authority he assumed to exercise or that the plaintiff is estopped from disputing it. That an agency of some kind did at one time exist in favor of Hartwig was sufficiently manifested by the power of attorney and proof of its due execution and delivery by Weber. If it be conceded that the act in question was within the authority which Hartwig once had, it would not aid the defendant, for that authority was determined by the death of Weber before the act was performed, and although Bridgman had no notice of his death the act was void and the estate of the principal is not bound.

The question is not new, and it has been uniformly

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answered by our decisions to the effect that the death of the principal puts an end to the agency, and, therefore, is an instantaneous and unqualified revocation of the authority of the agent. (2 Kent's Com. 646; *Hunt v. Rousmanier*, 8 Wheat. 174.) There can be no agent where there is no principal. There are, no doubt, exceptions to the rule, as where the agency is coupled with an interest (*Knapp v. Alvord*, 10 Pai. 205; *Hunt v. Rousmanier*, *supra*; *Hess v. Rau*, 95 N. Y. 359); or where the principal was a firm and only one of its members died. (*Bank v. Vanderhorst*, 32 N. Y. 553.) But both cases recognize the general rule to be as above stated. In *Davis v. Windsor Savings Bank* (46 Vt. 728), the rule was applied. The defendant paid money to the agent after the death of his principal, but in ignorance of it, and the administrator of the deceased recovered. It is quite unnecessary to go through the cases on this subject. The rule at common law which determines the authority of an agent by the death of his principal is well settled, and no notice is necessary to relieve the estate of the principal of responsibility, even on contracts into which the agent had entered with third persons who were ignorant of his death. Those who deal with an agent are held to assume the risk that his authority may be terminated by death without notice to them. This rule was established in England (*Leake on Con.* 487), although now modified by statute, and is generally applied in this country. (*Story on Agency*, § 488; *Pars. on Con.* vol. 1, p. 71; 2 Kent's Com. [12th. ed.] 645, 646.)

In some states alterations have been made by statute; and, following the civil law, it was held in Pennsylvania (*Cassidy v. M'Kenzie*, 4 Watts & Serg. 282), that the acts of an agent or attorney, done after the death of his principal, of which he was ignorant, are binding upon the parties. This was, however, in opposition to the current of authority. (1 *Pars. on Con.* 71; 2 Kent's Com. 646.) But even that case does not aid the defendant, for here the agent knew of the death of his principal. Moreover, the defendant might have known it had he taken the precaution to inquire. He had never before dealt with the agent. The power of attorney was not of

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recent date, and the defendant should be held to have assumed the burden of showing that Hartwig was, at the moment of the transaction, a person authorized to act so as to bind the real owner of the bond and mortgage, whoever that person might prove to be. There is no equity in his favor, for the loss, if any, is from his own negligence.

It is claimed, however, by the learned counsel for the respondents, that the rule has application only where the act of the agent is required to be done in the name of the principal, and his contention is, as we understand it, that, inasmuch as Hartwig had possession of the bond and mortgage, the defendant from that fact had a right to infer an agency to collect, and so the payment was valid. However that might be under other circumstances, the contention has no force in this instance. The power of Hartwig was not left to inference. Whatever it was it came before the defendant in writing. The power of attorney was in his hands. It authorized such acts only as could be performed in the name of the principal, and so the defendant understood it. He caused the power to be recorded, took a discharge of the mortgage under it executed by Hartwig as agent for Weber, and gave the check payable to the order of Hartwig in that character. Except for the power of attorney and its recitals, and the acts of Hartwig under it, the defendant would not have even the shadow of a defense. In his own name Hartwig could do nothing, and of this the defendant had full notice. The power of attorney which accompanied possession of the securities defined the actual authority, and the defendant had notice of its contents at the same moment that he saw the bond and mortgage in the hands of the attorney. The authority which might be gathered from their mere possession is, under these circumstances, of no force. The giving of an authority in writing imports that the extent of the authority is to be looked for in its terms, and not elsewhere.

But a more difficult question remains, one on which the courts below differed, and in consequence of which difference we have jurisdiction to pass upon it. (Code, §§ 1337, 1338.)

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It is a question of fact whether, with knowledge of the circumstances, the plaintiff ratified the payment. *

* * * * *

It is true that between the time of payment and the beginning of this suit many years elapsed, but the fact of payment was unknown to plaintiff. It is also true that she failed, before this action and during all these years, to demand either principal or interest from the defendant, but she was altogether ignorant that the security existed, by means of which either had become due. To show the contrary was the duty of the defendant, if the truth enabled him to do so. The trial judge found that he had failed in this respect, and we have no hesitation in saying that a different finding would not have been justified by the testimony. The conclusion ~~factually~~ reached was the only one permitted by the evidence. The appeal necessarily succeeds. (*Sherwood v. Hauser*, 94 N. Y. 626; *Baird v. Mayor*, etc., 96 id. 567; *Crane v. Baudouine*, 55 id. 256; *Westerlo v. De Witt*, 36 id. 340.)

The order of the General Term should, therefore, be reversed, and the judgment of the Special Term affirmed, with costs.

All concur.

Ordered accordingly.

* The omitted portion of the opinion discusses the evidence as to knowledge and ratification of payment by plaintiff; the court coming to the conclusion that it failed to show such knowledge or ratification.

Statement of case.

CHARLES B. MYERS, as Administrator, etc., Respondent, v.
JAMES CRONK, as Administrator, etc., Appellant.

E., plaintiff's decedent, was the owner at the time of her death, which occurred in 1878, of a promissory note executed by H., her husband, defendant's intestate, which, by its terms, fell due in May, 1878. E. left a will, by which she bequeathed the note to certain persons named. H. proposed to the legatees that in case payment was not required, he would upon his death will all his property to them. The note was thereupon surrendered to him; he died intestate in 1883. The will of E. was thereafter probated and letters of administration, with the will annexed, issued to plaintiff. On reference under the statute of a claim based upon the note, *held*, that if there was a valid agreement between H. and those to whom the note was bequeathed, then his estate was not liable upon the note, but only for a breach of the contract agreement, which cause of action belonged to the legatees, not to plaintiff; if the agreement was invalid, then H. remained liable on the note simply, and the statute of limitations was a bar; that defendant was not estopped by the agreement from setting up the bar of the statute, as plaintiff represented none of the parties and was an entire stranger thereto.

(Argued April 24, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 3, 1887, which modified, and affirmed as modified, a judgment in favor of plaintiff, entered upon the report of a referee.

This was a reference under the statute of a disputed claim against the estate of defendant's intestate. The claim presented, so far as material here, was as follows:

"The estate of Hiram A. Ferguson, deceased, to Charles B. Myers, administrator, etc., with the will annexed, of Evaline B. Ferguson, deceased, *Dr.*, to promissory note, of which the following is a copy:

"TROY, May 10, 1873.

"\$600.

"One year after date I promise to pay to Evaline B. Ferguson, or bearer, six hundred dollars, with interest, at _____.
Value received.

"HIRAM A. FERGUSON."

Statement of case.

The facts found by the referee were, in substance, these :

Evaline B. Ferguson died June 8, 1878. She owned and held at that time a promissory note executed by Hiram A. Ferguson for \$600, dated May 10, 1873, payable one year from date. She left a will, by which she bequeathed the note to certain persons named, which will was delivered to her said husband by one of the witnesses in whose possession it was placed by the testatrix. After the death of said Hiram A. Ferguson the note was found among his papers, having been surrendered and left with him under the proposal and promise set forth in the report as follows :

"That on the 9th of June, 1878, at Troy, the said Hiram A. Ferguson * * * after reading said will then and there, and at different times afterwards, proposed and promised, in substance and to the effect, that if the said legatees above-named would permit him to keep * * * the amount due to the said legatees, as designated in said will * * * during his life, and not cause the said will to be probated, and permit the estate of his said wife to remain in his hands without being administered upon so far as said legacies were concerned, then, and in that case, the said legatees should, at his death, have the whole of his estate then remaining, divided between them share and share alike, and should also receive the said amount due them severally under the said will of his wife, and that he would make and leave a will at his death to that effect.

"That the said legatees accepted said proposition and promise so made, as aforesaid, by the said Hiram A. Ferguson and consented thereto, and relying thereon, and acting upon the faith thereof, fully performed what was required of them as the conditions of such proposal and promise, and did not require of said Ferguson the legacies so due to them, as aforesaid, * * * and surrendered the said note of six hundred dollars to the said Ferguson, who received and retained the same * * * as above, and no part thereof has, at any time been paid to or received by the said legatees, or either of them, from the said Hiram A. Ferguson.

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"That the said legatees, at the request of said Hiram A. Ferguson, in compliance with the proposition made by him as aforesaid, and relying upon the promise made by him as hereinbefore stated, did not cause the said will of Evaline B. Ferguson to be probated, or her estate to be administered upon, or the amount due them thereby to be collected of or paid by the said Ferguson during his lifetime."

Ferguson died August 10, 1883, intestate. On or about the 22d day of October, 1883, plaintiff was duly appointed administrator, with the will annexed, of the said Evaline B. Ferguson.

The referee found that plaintiff was entitled to judgment for the amount of the note, with interest. The judgment was modified by the General Term by striking out this amount.

Edgar T. Brackett for appellant. The note was presumptively a legal and valid debt of defendant's intestate, notwithstanding it was executed by a husband to his wife. (*Benedict v. Driggs*, 34 Hun, 94.) An agreement of one upon consideration to make a will in favor of another is valid. (*Sherman v. Scott*, 27 Hun, 331, 333; *Peck v. Vandemark*, 99 N. Y. 29; *Todd v. Weber*, 95 id. 181; *Robinson v. Raynor*, 28 id. 494; *Lamport v. Beaman*, 34 Barb. 239; *Palmer v. North*, 35 id. 282; *Beckwith v. Brackett*, 97 N. Y. 52; *Reynolds v. Robinson*, 54 id. 589, 594.) The agreement was, therefore, a valid one, or, if not valid, it was void only because within the statute of frauds, not being in writing; but, in either case, the defendant's intestate having died, leaving no will as he had agreed to do, his neglect operated as a repudiation or rescission by him of his agreement, and thereby revived the right of action on the note which had been suspended by said agreement during the life of the defendant's intestate; and the defendant would not be allowed to set up the statute of limitations in bar of a suit on the note. (*Quackenbush v. Ehle*, 5 Barb. 469, 472; *Patterson v. Patterson*, 13 J. R. 379; *Campbell v. Campbell*, 65 Barb. 639, 642; *Abbott v. Draper*, 4 Denio, 51.) Or the plaintiff is entitled to recover on an implied promise to pay the value of

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the note so delivered up to the defendant's intestate at his request, and kept by him under said agreement until it was outlawed, he having failed to pay therefor as and in the manner he had previously agreed to do. (*Moody v. Smith*, 70 N. Y. 598; *Erben v. Lorillard*, 19 id. 299; *Rickard v. Stanton*, 16 Wend. 25; *Rosepaugh v. Vandenburg*, 16 Hun, 60.) Or plaintiff was entitled to recover the value of the note, because of an illegal and unauthorized appropriation and conversion of it by Ferguson. (*Smith v. Stewart*, 6 J. R. 46; *Powers v. Ingraham*, 3 Barb. 576.) The right of action in either form did not accrue until the death of Ferguson, and, of course, the statute of limitations was no bar to the action. (*Thurber v. Chambers*, 66 N. Y. 43, 48, 49.)

Orin Gambell for respondent. A contract cannot be made by one person alone. It takes two to make a bargain. (*S. R. R. Co. v. Echternacht*, 60 Am. Dec. 50.) An agreement to be binding must be mutual in its character. (*Brownley v. Jeffries*, 2 Vern. 415; Willard's Eq. Juris. 269; *Benedict v. Lynch*, 1 Johns. 370.) If it appears that one party never was bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality. (*Hopkins v. Logan*, 8 M. & W. 241; *Dorsey v. Packwood*, 12 How. 126; 49 N. H. 444; *Hodder-son Car Co. v. Haslewood*, 6 C. B. [N. S.] 239; 2 C. B. 808; *Sykes v. Dixon*, 9 Adol. & Ellis, 693; Addison on Contracts, § 18; Parsons on Contracts, § 449; *U. R. R. Co. v. Brencherhoff*, 21 Wend. 139; *Lester v. Jewett*, 12 Barb. 502; *Myers v. Cronk*, 45 Hun, 401, 404.)

PECKHAM, J. We think there are no merits in this appeal. It has been very properly said at the General Term that if the alleged agreement were made between the Myers heirs and the defendant's intestate in 1878, and if it were a valid agreement, then the defendant is not liable on the note, because under a valid agreement the note was surrendered to the intestate; and if there were no valid agreement, then the intestate

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remained liable on the note from the time it became due, and it was consequently outlawed at the time of the commencement of this action. Plaintiff insists that the contract, as found by the referee, was actually carried out by the parties, and the liability thereby created on the part of defendant's intestate, and irrespective of the statute of frauds, was a legal and valid one, and was a substitute for his original liability on the note; and as the arrangement was carried out by the legatees, the administrator of the intestate (the defendant herein), is estopped from setting up the defense of the statute of limitations as a bar to the claim made herein upon the note.

The reasoning is, as it seems to us, absolutely without foundation. Upon the assumption of the validity of the agreement the note was extinguished long since. But it is also plain that the plaintiff represents neither of the parties to the agreement, and he is in privity with neither. The agreement was made between the defendant's intestate, on the one side, and the heirs of his deceased wife on the other. The plaintiff is, and he sues as, an administrator with the will annexed of such deceased wife, and in that capacity he is a total stranger to the whole transaction which resulted in the agreement in question. To estop the defendant, in a proceeding by such an administrator, from setting up the bar of the statute, because of an agreement theretofore made by defendant's intestate with third parties, to which agreement the plaintiff is neither a party or a privy, is to work out a new principle in the law of estoppel. Assuming the agreement to have been legal, and to have been carried out on the part of the Myers heirs, they had in that event a good cause of action against the estate of the intestate to recover damages on account of its breach by such intestate. That cause of action is not set forth here, and it does not belong to the plaintiff, as administrator with the will annexed of Mrs. Ferguson's estate, and the whole subject is foreign to this litigation. If the agreement were valid, the intestate could not, of course, rescind it or legally repudiate it. He could violate it and thus render his

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estate liable for its breach, but his violation of it could not revive the right of action on the note, which had been long before that legally extinguished by its surrender pursuant to the terms of the agreement.

No case cited by plaintiff's counsel holds any such principle as that in a case like the present, the defendant administrator is estopped from setting up the defense of the statute. On the other hand, if this alleged agreement be void, the plaintiff's attitude is equally untenable. In that event all that can be said is, that the defendant's intestate and the Myers heirs entered into an agreement which was absolutely void, and which, therefore, bound no one. The plaintiff, in the capacity in which he sues, was in no way connected, even with such void agreement, and, in truth, he was not appointed until after the decease of the defendant's intestate. The fact that no administrator was appointed at an earlier date did not, however, prevent the running of the statute in the meantime.

Subsequent to his appointment, and before the commencement of this proceeding to recover on the note, the statute had run against it, and why the defendant should not be able to set it up I cannot see. There was a clear legal right at all times to prove the will of Mrs. Ferguson, and to take proceedings to collect the note, and if nothing of that kind were done because of an understanding between some parties, which was wholly void, such understanding can form no estoppel against defendant from setting up the statute in a proceeding to collect the note by the administrator with the will annexed of the estate of Mrs. Ferguson, who, in such capacity, has no connection with the agreement in question as a party to it, and who stands in no privity whatever with any one who was a party to it. Not being bound by any estoppel himself, he can claim the benefit of none, for it is familiar that estoppels, to be binding, must be mutual.

We think there is nothing in the idea that the claim in this proceeding was for the note itself as a piece of paper. It was clearly a proceeding to obtain payment of a debt evidenced by the promissory note in question. The claim itself shows

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such to be the fact, and the course of the trial is also conclusive evidence thereof. To sustain the action the plaintiff offered and read in evidence the note in question, and it was objected to upon the ground that it was barred by the statute of limitations; which objection was overruled and the note offered in evidence. As the note from its date, and the absence of any indorsements of payment of interest, or any part of the principal, was apparently outlawed, the plaintiff then continued the case for the purpose of attempting to prove the agreement in question as an answer to the statute. There was, upon the trial, no pretense of a cause of action for conversion, or for the delivery of the piece of paper on which the note was written, nor do we think that any such cause was proved, even if it had been alleged. No demand or refusal was proved, and when the attempt is now made to found a cause of action on an alleged conversion of property which came properly into the hands of defendant's intestate, such proof is necessary. It is true that no such question as to the necessity of a demand, etc., was raised on the trial, but the fact is clear that upon the trial there was no occasion for it because it was not pretended or assumed, so far as this record shows, that any cause of action for a conversion of the paper upon which the note was written was alleged or attempted to be proved. When it is alleged for the first time in this court, an answer to it may for the first time be here set up.

There was no error in the disposition of the case by the General Term, and its judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

MEMORANDA

OF THE

*CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME, WHICH ARE NOT REPORTED IN FULL.*

NATHANIEL P. BAILEY et al., Respondents, *v.* NEW YORK
ARCADE RAILWAY COMPANY, Appellant.

THIS case presented the same questions and was argued and
decided with *Astor v. N. Y. A. R. Co.* (*Ante*, p. 93).

MARCUS M. BEEMAN, Respondent, *v.* GEORGE A. BANTA,
Appellant.

(Argued March 5, 1889; decided March 12, 1889.)

MOTION to compel the appellant to file a new undertaking with sufficient sureties as required by law, on the ground that one of the sureties to the original undertaking had become insolvent, or in case of failure the appeal be dismissed. The appellant asked that in case the court decided to require a new undertaking it be simply for costs.

The following is the *mem.* of opinion:

"We refuse the request of the defendant to be allowed to file an undertaking for costs only because, by virtue of his original undertaking, the plaintiff has been stayed from enforcing his judgment ever since the appeal to this court was taken.

"The appellant ought not to have the benefit of such stay up to the present time, and then by the filing of an undertaking for costs only retain his appeal and leave the plaintiff in a possibly much worse condition towards obtaining the

fruits of his judgment than he would have been in had the right of enforcement continued from the time of its entry."

Baldwin, Lewis & Kennedy for motion.

John H. Parsons opposed.

Per Curiam mem. for dismissal of appeal unless the appellant, within twenty days from service of the order upon him, file a new undertaking to the same effect as the original.

All concur.

Ordered accordingly.

ALFRED NELSON, Executor, etc., v. SUTHERLAND TENNEY,
Assignee, etc., Impleaded, etc.

Where no undertaking has been filed or served upon appeal to this court, the Supreme Court has no power to grant an order allowing the appellant to perfect his appeal by filing an undertaking.

(Argued March 5, 1889; decided March 12, 1889.)

MOTION to dismiss appeal from a judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made July 9, 1886, which affirmed a judgment in favor of plaintiff, entered upon trial at Special Term, and to strike cause from calendar on the ground that the appeal has never been perfected. No undertaking was filed or served with the notice of appeal. The Supreme Court, on motion, granted an order allowing the appellant to perfect his appeal by giving an undertaking.

Frank Forbes for motion.

John Lindley opposed.

Agree to grant motion on ground that the Supreme Court had no power to grant an order allowing the appellant to perfect his appeal by filing an undertaking, and no reason is shown to this court excusing the delay.

All concur.

Motion granted.

ADAM EMMERICH, Appellant, v. PETER HEFFERAN et al.,
Respondents.

(Argued March 5, 1889; decided March 12, 1889.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made March 1, 1886, which affirmed a judgment in favor of plaintiff.

This was a motion to reverse, founded upon an order to show cause issued under section 1298 of the Code of Civil Procedure.

William G. McCrea for motion.

Agree to reverse and to grant new trial.

All concur.

Judgment reversed.

MARIA T. POLHEMUS, Respondent. v. THE FITCHBURGH RAIL-
ROAD COMPANY, Appellant.

An action against a railroad corporation to recover the amount of interest coupons upon bonds issued by another similar corporation, based upon an agreement between the two companies, by which defendant has become liable for their payment, is not an action "founded upon a note or other evidence of debt, for the absolute payment of money" within the meaning of the provision of the Code of Civil Procedure giving to such an action against a corporation a preference upon the calendar. (§ 791, sub. 8.)

Nor do the facts, upon which such an action is based, furnish a reason for giving it a preference, by the court, in the exercise of its discretion; plaintiff stands in no better position than ordinary litigants.

(Argued March 5, 1889; decided March 12, 1889.)

MOTION to place cause on calendar and to advance the same.
The following is the *mem.* of opinion:

"The plaintiff is the holder of ten interest coupons of thirty-five dollars each, issued by the Troy & Boston Railroad Company as part of certain mortgage bonds. Her claim is that the defendant, by reason of an agreement with the

Troy & Boston Railroad Company, has become liable for their payment. The courts below have sustained that claim and the defendant having appealed from the judgment to this court, the plaintiff asks to have the case put upon the present calendar and so advanced as to give it a preference over all other cases by putting it at the head of the calendar. The preference is claimed under section 791, subdivision 8, of the Code, which gives a certain priority, among others, to 'an action against a corporation, founded upon a note or other evidence of debt for the absolute payment of money.' The obligation of the defendant cannot be regarded as of that character. The note or promise to pay money is that of the Troy & Boston Railroad Company. The defendant's promise is to be found elsewhere, and if an obligation exists, of which the plaintiff can avail herself by action, it is because the agreement of consolidation of the two corporations and the covenant by one to the other and the action is, in fact, founded on that agreement.

"Nor are the reasons given for putting the case on the present calendar sufficient in any other view. The most that can be said is that two corporations differ in their construction of a mutual agreement, and in the meantime neither fulfills its obligation to the holder of its securities. Such defaults are not so uncommon as to require special attention, and those who suffer have no better position than ordinary litigants.

"The motion should be denied, but without costs."

Masten & Nichols for motion.

John H. Peck opposed.

DANFORTH, J., reads *mem.* for denial of motion.

All concur.

Motion denied.

ANTHONY R. MAICAS, Respondent, v. LEON LEONY, Appellant.

Where, in an action for the dissolution of a copartnership and for an accounting, an order was entered by consent referring it to a referee named to hear and determine the issues, to take and state the accounts and report the amount for which judgment should be entered in favor of either party against the other, and where, upon the report of the referee, which did not contain separate findings of law and of fact as required by the Code of Civil Procedure (§ 1028) and was otherwise informal and incomplete, an interlocutory judgment was entered, *held*, that the Supreme Court had power to set aside the report and the judgment, and with the exercise of its discretion in this respect this court could not interfere; but that in the absence of allegations of misconduct on the part of the referee the Supreme Court had no power to set aside the order of reference and all proceedings under it and to refer the case to a new referee to try the same, *de novo*, but should have sent the case back to the referee; also, that a provision in the order that the evidence already taken might, by the consent of both parties, be read before the new referee, did not validate it.

It seems, if the referee committed any errors of law or fact, the remedy was by appeal from the judgment entered upon his report.

(Argued March 5, 1889; decided March 19, 1889.)

APPEALS from two orders of the General Term of the Supreme Court in the first judicial department, made November 23, 1888, one of which affirmed an order of Special Term vacating and setting aside the report of a referee and an interlocutory judgment entered thereon, and directing the appointment of a new referee; the other affirmed an order of Special Term denying a motion on the part of defendant for the appointment of a referee in the place of one previously appointed, to proceed with the duties of the reference.

This was an action for the dissolution of a copartnership and for an accounting between the partners.

The issues made by the pleadings was referred by consent to a referee named, he also to take and state the accounts and report what judgment, if any, should be rendered in favor of either party against the other. At the time of the granting of the order of reference plaintiff was appointed a receiver of the partnership assets.

The following is the opinion, save the direction as to order, which is stated below:

“What is called the report of the referee in this case is quite informal and incomplete. It does not contain separate findings of law and of fact as required by the Code (§ 1022), and such findings as are contained therein are so commingled with what appears to be the opinion of the referee that it is difficult in some respects to distinguish the one from the other. It was, therefore, within the power of the Supreme Court to set aside the report and the interlocutory judgment which was entered *ex parte* thereon. Whether it would set them aside was a matter of practice resting in its discretion, with the exercise of which we cannot interfere.

“But the court went still further and set aside the order of reference and all proceedings thereunder, and appointed a new referee to try the case *de novo*. There had been a long trial before the referee, his fees being \$1,365 and the stenographer's \$400, and the expenses for counsel must have been considerable. All this expense was incurred by the defendant, and the court could not arbitrarily, without some reason sufficient in law, nullify all that had been done under the order of reference. The action was referred by consent to the referee named to determine all the issues and to take and state the account between the parties, and report the amount for which judgment should be entered in favor of either party against the other. There is no allegation of misconduct on the part of the referee. It is simply alleged that he committed some errors and that he did not complete the reference by taking all the accounts and stating the balance and ordering judgment for such balance. But he took all the evidence offered by either party. Both parties rested their case; both asked him to order an interlocutory judgment, and both submitted their requests to find upon the law and the facts. As there was firm property in the hands of the receiver undisposed of, the case was not then in condition for final judgment, and, so far as the facts now appear, was one eminently proper for an interlocutory judgment. Under the order of reference the referee should go on, so far as he can, and take all the proof which either party may offer with reference to the accounts and settle all the accounts so far as that

is possible in the present condition of the affairs of the firm; and after that, if there is property on hand yet to be disposed of, and which will thereafter have to be converted by the receiver and accounted for by him, such a judgment may be entered as the referee will be able to order, and a further accounting may be had in the future with reference to the balance of the assets. Under such circumstances, upon such allegations and facts as appear here, we know of no authority or power in the Supreme Court arbitrarily to set aside the order of reference and all the proceedings thereunder and appoint a new referee.

"If the referee committed any errors of law or of fact, they cannot be corrected by a motion at a Special Term of the court to set aside the order of reference and all proceedings thereunder, but the orderly method prescribed by law for correcting them is by appeal from the judgment entered upon his report.

"After setting aside the report and the interlocutory judgment the court should have sent the case back to the referee that he might complete the trial thereof so far as he could go, and so far as the parties desired him to go, and thus both parties would have the benefit of the trial and the large expenditure that had thus far been incurred.

"The provision in the order that the evidence already taken may, by the consent of both parties, be read before the new referee, does not give the defendant all he is entitled to and secure all his substantial rights. The plaintiff may withhold his consent and then his evidence cannot be read and the new referee will not have the benefit of seeing and hearing the witnesses.

"If the referee has, in fact, been guilty of any misconduct, or if for any sufficient reason he is an improper person to proceed with the trial, the facts should be made to appear, and then the court would have jurisdiction to vacate the order of reference and to appoint a new referee to proceed *de novo*."

Esek Cowen for appellant.

A. J. Dittenhoefer for respondent.

EARL, J., reads for affirmance of order of General Term, which affirmed order of Special Term denying defendant's motion for the appointment of a referee to take and state the accounts, and for affirmance of the other order of General Term and the order of Special Term affirmed by it so far as they vacate and set aside the report of the referee and the interlocutory judgment, and for reversal of the said orders in other respects, so that the case may stand for further trial before the referee.

All concur.

Ordered accordingly.

118 622
116 421

BRIDGET HUSTON, as Administratrix, etc., Respondent, v.
EDWARD G. GILBERT, Appellant.

(Argued March 4, 1889; decided March 19, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 22, 1886, which affirmed a judgment in favor of plaintiff, entered on a verdict and an order denying a motion for a new trial.

Charles E. Patterson for appellant.

E. Countryman for respondent.

Agree to affirm; no opinion.

All concur, except PECKHAM, J., not sitting.

Judgment affirmed.

ELLEN HALSEY, as Administratrix, etc., Respondent, v. THE
ROME, WATERTOWN AND OGDENSBURG RAILROAD COMPANY,
Appellant.

(Argued March 4, 1889; decided March 19, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order

made November 15, 1887, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

Edmund B. Wynn for appellant.

C. S. Huntington for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

LAWRENCE O'LOUGHLIN, Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(Argued March 4, 1889; decided March 19, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of June, 1887, which affirmed a judgment in favor of plaintiff, entered on a verdict.

Edward Harris for appellant.

Quincey Van Voorhis for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

RUTH TORBETT, Respondent, *v.* SHERBURNE B. EATON, Appellant.

113	623
118	376

(Argued March 5, 1889; decided March 19, 1889.)

APPEAL from an interlocutory judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 19, 1888, which affirmed a judgment entered at Special Term sustaining the demurrer of plaintiff to a portion of defendant's answer.

Eugene H. Lewis for appellant.

William W. Badger for respondent.

Agree to affirm; no opinion.

All concur, except EARL and DANFORTH, JJ., dissenting.

Judgment affirmed.

THE PEOPLE ex rel. JOHN P. WHITLOCK, Respondent, v. THE
COMMISSIONERS OF HIGHWAYS OF THE TOWN OF PALATINE,
Appellant.

(Argued March 5, 1889; decided March 19, 1889.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made May 1, 1888, which affirmed an order of Special Term directing a peremptory writ of *mandamus* to issue.

D. S. Morrill for appellant.

L. M. Weller for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

In the Matter of the Opening of Emmons Avenue from East
Fourteenth Street to Hog Point Creek in the Town of
Gravesend; JOHN G. SCHUMAKER, Appellant.

(Argued March 5, 1889; decided March 19, 1889.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made July 25, 1888, which affirmed an order of Special Term, confirming the report of commissioners appointed in the above entitled proceeding.

William G. Cooke for appellant.

James C. Church for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

RAYMOND CHRISTMAN, Respondent, *v.* JOHN W. THATCHER, as Overseer of the Poor of the Town of Amsterdam et al., Appellants.

(Argued March 5, 1889; decided March 19, 1889.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made May 1, 1888, which reversed an order of Special Term allowing the town of Amsterdam to intervene in an action brought by plaintiff against Thatcher, as overseer of said town.

Nathaniel C. Moak for appellants.

E. P. White for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

JULIUS CATLIN, Jr., et al., Executors, etc., Plaintiffs, *v.* THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA et al., Defendants.

THIS case presented the same questions and was argued and decided with *Catlin v. Trustees, etc., et al.* (*Ante*, p. 133.)

WILLIAM Y. MORTIMER et al., Executors, etc., Respondents, v.
THE METROPOLITAN ELEVATED RAILWAY COMPANY et al.,
Appellants.

(Argued March 6, 1889; decided March 26, 1889.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made November 22, 1887, which affirmed a judgment in favor of plaintiffs, entered upon a verdict and an order denying a motion for a new trial.

Edward S. Rapallo for appellants.

John E. Parsons for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

MARY BLEYLE, Administratrix, etc., Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(Argued March 7, 1889; decided March 26, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 21, 1887, which affirmed a judgment in favor of plaintiff, entered on a verdict and an order denying a motion for a new trial.

James F. Gluck for appellant.

Stilwell & Hill for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

DYKMAN ODELL, Respondent, *v.* ISAAC BUCKHOUT, Executor,
etc., Appellant

(Submitted March 7, 1889; decided March 26, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 14, 1886, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

L. C. & W. P. Platt for appellant.

Thomas Nelson for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

STEPHEN V. HARKNESS, Appellant, *v.* THE NEW YORK ELEVATED RAILROAD COMPANY et al., Respondents.

(Argued March 8, 1889; decided March 26, 1889.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made November 21, 1887, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term.

William H. Arnoux and *C. P. Cowles* for appellant.

Julien T. Davies for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

SARAH WORTMAN et al., Respondents, *v.* MARY A. ROBINSON,
Impleaded, etc., Appellant.

(Argued March 11, 1889; decided March 26, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 9, 1887, which affirmed a judgment in favor of plaintiffs, entered upon an order overruling a demurrer to the complaint and which directed final judgment.

John W. Fiske for appellant.

Harrison S. Moore for respondents.

Agree to affirm ; no opinion.

All concur. •

Judgment affirmed.

JOHN KELLY, Administrator, etc., Respondent, *v.* THE TWENTY-
THIRD STREET RAILWAY COMPANY, Appellant.

(Argued March 11, 1889; decided March 26, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made February 6, 1888, which affirmed a judgment in favor of plaintiff, entered on a verdict.

Leslie W. Russell for appellant.

Alfred Steckler for respondent.

Agree to affirm ; no opinion.

All concur, except EARL, J., dissenting.

Judgment affirmed.

WINSTON JONES, as Assignee, etc., Respondent, *v.* THE MERCHANTS' NATIONAL BANK OF THE CITY OF NEW YORK, Appellant.

(Argued March 19, 1889; decided March 26, 1889.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 18, 1888, which affirmed an order of the Circuit canceling the clerk's minutes of trial and substituting other minutes, and an order of Special Term amending judgment for plaintiff and reconstructing the judgment-roll.

The following is the *mem.* of opinion :

"The verdict of the jury disposed of the real issues involved in the action. It remained only to compute the interest and ascertain the value of the property at the time of the trial and to put the verdict in proper form. The appellant claims that at the time the verdict was directed there was an agreement, by consent in open court, that the interest should be subsequently computed by the court unless counsel could agree upon the same. On the other hand, it is claimed by the plaintiff that it was stipulated that counsel should agree between themselves upon the interest and the value of the property, or if they could not, that the evidence as to them should be taken before the judge, without the jury, before the entry of judgment. As there was a conflict in regard to what the precise agreement was, we must take the facts here as claimed by the plaintiff. The interest was subsequently computed and proof of the value of the property at the time of the trial was taken before the judge, and all that the courts have been trying to do since, and have actually accomplished, has been to carry out the stipulation and to put the verdict in proper form and cause the entry of the proper judgment. The verdict and judgment as finally recorded and entered are in precise conformity with the agreement of counsel and the requirements of the law; and the only relief against the judgment, to which the appellant is now entitled, is by an appeal therefrom.

"We think the court had the power to make the orders appealed from in the exercise of its discretion, and this appeal should, therefore, be dismissed, with costs."

John E. Burrill for appellant.

Burton N. Harrison for respondent.

Per Curiam mem. for dismissal of appeal.

All concur, except GRAY, J., not voting.

Appeal dismissal.

WILLIAM M. HOWITT, Appellant, v. ISAIAH M. MERRILL,
Impleaded, etc., Respondent.

As to whether relief will be given to an attorney, having a lien upon a judgment for his costs, against a fraudulent satisfaction thereof by his client upon a summary application by motion, or he will be required to bring suit, is within the discretion of the Supreme Court, and its determination is not reviewable here.

(Argued March 19, 1889; decided March 26, 1889.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made June 25, 1888, which affirmed an order of Special Term denying a motion to set aside a satisfaction of judgment herein.

The following is the *mem.* of opinion:

"On the 24th day of May, 1881, the plaintiff, by Van Name, his attorney of record, obtained judgment against the defendant for \$230 damages and \$107⁸⁸/₁₀₀ costs and disbursements. On the 14th of April, 1882, the defendant paid the plaintiff \$150 and took from him a satisfaction piece. Both plaintiff and defendant refuse to pay the attorney his costs in the action, and the attorney, in his own behalf, moved the court to set aside 'the satisfaction of the judgment to the extent of the costs and disbursements.' At Special Term the motion was opposed by affidavits and was denied by the court. Upon appeal the General Term affirmed the order. The plaintiff's lien upon the cause of action and the judgment is undoubted

(Code, § 66), but the lien might be waived or lost by the conduct of the attorney; and whether, assuming its existence, relief should be given against a fraudulent satisfaction upon a summary application by motion, or upon action brought, was within the discretion of the Supreme Court, subject to no interference by an appellate tribunal. Here the appeal in both courts was by the plaintiff in the action and his attorney jointly. If the motion papers are to be credited, it might easily be held that the plaintiff colluded with the defendant, and, for aught that appears, the Supreme Court thought it expedient to leave the attorney to assert his right, if any he had, by action.

"The appeal should, therefore, be dismissed."

Charles R. Hall for appellant.

Thomas W. Fitzgerald for respondent.

DANFORTH, J., reads for dismissal of appeal.

All concur.

Appeal dismissed.

ANN MULHOLLAND, Appellant, v. THE MAYOR, ALDERMEN AND
COMMONALTY OF THE CITY OF NEW YORK, Respondent.

A contract between M., plaintiff's assignor and defendant, for grading and flagging one of its streets, permitted a change of the grade indicated upon the plan and profile of the work without additional compensation. Through the erroneous action of defendant's engineer, not from any intentional change of plan, more work was required of the contractor and additional expense was incurred by him than would have been necessary under the contract. *Held*, that plaintiff was entitled to recover for the additional labor and expense according to its value and amount; that she was not confined to the rate of compensation provided in the contract for similar work.

(Argued March 4, 1889; decided March 29, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made February 21, 1887, which affirmed a judgment in favor

113	631
120	558
113	631
132	427

113	631
130	504
113	631
144	67

118	631
d151	252

113	631
160	528

of defendant, entered upon a verdict and affirmed an order denying a motion for a new trial.

The first cause of action, set forth in plaintiff's complaint herein, was for a balance alleged to be due on a contract between John Mulholland, plaintiff's assignor, and defendant, for grading, setting curb and gutter stones and flagging one of defendant's streets. A second cause of action was for damages alleged to have been caused by defendant's engineers in giving to the contractor wrong grades, in conforming to which and in correcting the error a large amount of additional work and expenditure was required, which would not have been necessary under the contract. The answer set up, among other things, various counter-claims.

The trial court charged that plaintiff had made out no case for the jury as to the second cause of action. The court here held that, as to the first cause of action and the counter-claims, the evidence was sufficient to justify the verdict of the jury.

As to the second cause of action the opinion is as follows:

"We are, however, of opinion that the learned trial judge erred in holding, as matter of law, that the plaintiff had no case for the jury under his second cause of action as alleged in the complaint. We do not think it expedient to discuss the evidence. It tends to show that, by the action of the defendant's engineers, more work was required from the plaintiff than would, under the contract, have been necessary for its completion, and that by their interference he was subjected to additional expense in its performance. That labor was not within the original plan, but caused by a deviation from it, and for its accomplishment was, in fact, useless. It was not occasioned by any intentional change of grade from that indicated upon the plan and profile of the work and, therefore, was not within the terms of the agreement, which permits a change without additional compensation. The change was erroneous, and if in the correction of the error or by reason of it the plaintiff performed extra labor and incurred increased expense, he is entitled to recover according to its value and amount, and is not confined to the rate of compensation provided for similar works by the special contract.

"The questions raised by the issues presented in the second cause of action should have been submitted to the jury, and for the error in the trial court in withholding them, the judgment should be reversed and a new trial granted, with costs to abide the event."

L. Laflin Kellogg for appellant.

D. J. Dean for respondent.

DANFORTH, J., reads for reversal and new trial.

All concur.

Judgment reversed.

JOHN BURLINGAME, Respondent, *v.* WILLIAM H. MANDEVILLE,
Appellant.

(Argued March 12, 1889; decided March 29, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made July 21, 1885, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

Frank Rumsey for appellant.

J. H. Waring for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

ELLEN E. LYON et al., as Administrators, etc., Respondents, *v.*
THE PORT HENRY IRON ORE COMPANY OF LAKE CHAMPLAIN,
Appellant.

(Argued March 13, 1889; decided March 29, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order

made January 26, 1886, which affirmed a judgment in favor of plaintiffs, entered on a verdict.

Chester McLaughlin for appellant.

Richard L. Hand for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

FRANKLIN SIDWAY, as Executor, etc., Appellant, v. CUBA STATE BANK, Respondent.

(Argued March 14, 1889; decided March 29, 1889.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made October 19, 1883, which reversed a judgment in favor of plaintiff, entered upon the report of a referee and ordered a new trial before another referee.

Ernest K. Weaver for appellant.

H. E. Sickels for respondent.

Agree to affirm order and for judgment absolute against plaintiff on stipulation ; no opinion.

All concur.

Ordered accordingly.

HARRIET VAN HORNE, as Administratrix, etc., Appellant, v. THE BOSTON, HOOSAC TUNNEL AND WESTERN RAILWAY COMPANY, Respondent.

(Argued March 14, 1889; decided March 29, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order

made November 16, 1886, which affirmed a judgment in favor of defendant, entered upon an order directing a nonsuit at Circuit.

Charles S. Lester for appellant.

T. F. Hamilton for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

CAROLINE L. ROBINSON, as Administratrix, etc., Respondent,
v. JAMES A. STRIKER, Appellant.

(Argued March 14, 1889; decided March 29, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 2, 1888, which affirmed a judgment in favor of plaintiff, entered on a verdict.

W. F. Dunning for appellant.

Charles De Hart Brower for respondent.

Agree to affirm; no opinion.

All concur, except EARL, J., dissenting.

Judgment affirmed.

LEANDER W. KAUFMAN, as Executor, etc., Appellant, v.
FRANCIS A. SCHOFEL, as Sheriff, etc., Respondent.

(Submitted March 15, 1889; decided March 29, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made December 30, 1887, which affirmed a judgment in favor of defendant, entered upon a verdict and an order denying a motion for a new trial.

George D. Forsyth for appellant.

Henry G. Danforth for respondent.

Agree to affirm ; no opinion.

All concur, except DANFORTH, J., taking no part.

Judgment affirmed.

HENRY C. ADAMS, Respondent, *v.* THOMAS C. VAN BRUNT,
Appellant.

(Argued March 5, 1889; decided March 29, 1889.)

MOTION to dismiss an appeal from a judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made February 16, 1889, which affirmed a judgment, entered upon a decision of the General Term of the City Court of New York affirming a judgment of said City Court in favor of plaintiff.

Thomas C. Ennever for motion.

Lemuel Skidmore opposed.

Agree to dismiss appeal ; no opinion.

All concur.

Motion granted.

MARY E. McKENNA, as Administratrix, etc., Appellant, *v.*
THE EAST RIVER FERRY COMPANY, Respondent.

(Argued March 18, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 9, 1887, which affirmed a judgment, entered upon an order dismissing the complaint, and affirmed an order denying a motion for a new trial.

Eugene Burlingame for appellant.

Nathan Bijur for respondent.

Agree to affirm ; no opinion.

All concur, except RUGER, Ch. J., ANDREWS and DANFORTH, JJ., dissenting.

Judgment affirmed.

MARGARET BUDD, Appellant and Respondent *v.* STEPHEN A. WALKER, as Executor, etc., Appellant and Respondent.

In an action for an accounting as to moneys alleged to have been placed in the hands of S., defendant's testator, by plaintiff for investment, the only evidence presented was a letter from S. to plaintiff, which, after acknowledging the receipt of the money and that it was drawing interest at seven per cent, continued as follows: "If I can find an opportunity of purchasing a mortgage * * * whereby I can, without risk, secure a greater profit, I shall do so unless you wish to make any other use of the money; should you desire to use it, please let me know." *Held*, that the relation of plaintiff to the decedent was that of a creditor upon a simple contract, not that of a beneficiary under a trust; that the amount was payable at once and the statute of limitations then began to run, and after the lapse of six years was a bar to the action.

(Argued March 14, 1889; decided April 16, 1889.)

CROSS-APPEALS from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 23, 1888, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

"This action was brought in 1882 for an accounting, among other things, because (1), as the complaint states, on the 22d of January, 1859, the 'plaintiff intrusted to Smales, the defendant's testator, \$953.72, which sum the testator shortly thereafter informed her he had invested for her at seven per cent per annum.' (2.) Because, 'on or about September, 1866, the testator took up his residence with the plaintiff in the house then occupied by her, being No. 29 West Thirty-third street, in the city of New York, and continued there until the month

George D. Forsyth for appellant.

Henry G. Danforth for respondent.

Agree to affirm ; no opinion.

All concur, except DANFORTH, J., taking no part.

Judgment affirmed.

HENRY C. ADAMS, Respondent, *v.* THOMAS C. VAN BRUNT,
Appellant.

(Argued March 5, 1889; decided March 29, 1889.)

MOTION to dismiss an appeal from a judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made February 16, 1889, which affirmed a judgment, entered upon a decision of the General Term of the City Court of New York affirming a judgment of said City Court in favor of plaintiff.

Thomas C. Ennever for motion.

Lemuel Skidmore opposed.

Agree to dismiss appeal ; no opinion.

All concur.

Motion granted.

MARY E. McKENNA, as Administratrix, etc., Appellant, *v.*
THE EAST RIVER FERRY COMPANY, Respondent.

(Argued March 13, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 9, 1887, which affirmed a judgment, entered upon an order dismissing the complaint, and affirmed an order denying a motion for a new trial.

Eugene Burlingame for appellant.

Nathan Bijur for respondent.

Agree to affirm ; no opinion.

All concur, except RUGER, Ch. J., ANDREWS and DANFORTH, JJ., dissenting.

Judgment affirmed.

MARGARET BUDD, Appellant and Respondent *v.* STEPHEN A. WALKER, as Executor, etc., Appellant and Respondent.

In an action for an accounting as to moneys alleged to have been placed in the hands of S., defendant's testator, by plaintiff for investment, the only evidence presented was a letter from S. to plaintiff, which, after acknowledging the receipt of the money and that it was drawing interest at seven per cent, continued as follows: "If I can find an opportunity of purchasing a mortgage * * * whereby I can, without risk, secure a greater profit, I shall do so unless you wish to make any other use of the money; should you desire to use it, please let me know." *Held*, that the relation of plaintiff to the decedent was that of a creditor upon a simple contract, not that of a beneficiary under a trust; that the amount was payable at once and the statute of limitations then began to run, and after the lapse of six years was a bar to the action.

(Argued March 14, 1889; decided April 16, 1889.)

CROSS-APPEALS from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 23, 1888, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

"This action was brought in 1882 for an accounting, among other things, because (1), as the complaint states, on the 22d of January, 1859, the 'plaintiff intrusted to Smales, the defendant's testator, \$953.72, which sum the testator shortly thereafter informed her he had invested for her at seven per cent per annum.' (2.) Because, 'on or about September, 1866, the testator took up his residence with the plaintiff in the house then occupied by her, being No. 29 West Thirty-third street, in the city of New York, and continued there until the month

of August, in the year 1870, when said testator and the plaintiff removed therefrom to the house No. 164 Fifth avenue, where they resided until the time of the death of said testator, in March, 1881; that during all the period from said September 1, 1866, down to the time of his death, the said houses were successively occupied, kept up and maintained for the joint benefit and joint account of said testator and said plaintiff, and with the agreement between them that said testator should bear, pay and contribute his own proper share or proportion of the expenses of the same in consideration of the benefit and advantage derived by him therefrom.'

"The answer admits that the plaintiff and the testator, at the time of his death, and for a long time prior thereto, resided at the house last named, No. 164 Fifth avenue, but denies the other allegations going to make up any cause of action, and, as affirmative matter, sets up the statute limiting actions upon contract to six years after the right of action accrued.

As to the first cause of action, the court here say: "Its only support is a paper produced by the plaintiff in the handwriting of the testator, and running thus: 1

'NEW YORK, *January 22, 1859.*

'DEAR MRS. VAN KLEECK:

'I have this day received from Mrs. Meinell, on your account, six hundred and fifty-three dollars and seventy-two cents (\$653.72), which, together with the three hundred dollars (\$300) you deposited in my hands about the first September last, are now drawing interest at the rate of seven per cent. If I can find an opportunity of purchasing a mortgage, such as I mentioned to you, whereby I can, without risk, secure a greater profit, I shall do so, unless you wish to make any other use of the money. Should you desire to use it, please let me know.

'H. SMALES.'

"Mrs. Van Kleeck, to whom the letter is addressed, became in 1862, by marriage, Mrs. Budd, and is the plaintiff. In 1859, Mrs. Meinell was in New York and the plaintiff was in Europe. The transaction appears to be explained in a letter dated January 2, 1859, written by Smales to the plaintiff, and in

which, referring to Mrs. Meinell, he says: 'She mentioned your having requested her to hand me the amount of some commissions executed for her in Paris, and that she should do so as soon as they are completed, and I told her I supposed you would send me some directions on the subject.' Both letters were written by him in New York, and sent to her in Paris by mail. The letter and its recitals are, of course, evidence between the parties of the facts recited. It, therefore, appears that in September, 1858, the plaintiff deposited with the testator \$300, and that on the 22d day of January, 1859, he received on her account \$653.72, and that both sums were bearing interest at the rate of seven per cent. The money was subject to her order and to any use she might choose to put it from that moment. So the letter states, and such would be the implication if there were no statement. As to the decedent, her relation was that of a creditor upon a simple contract and not that of a beneficiary under a trust. He was at once liable to pay as debtor, whether he became such in his character as attorney, collecting money for his client, or whether by transmission from her he received it as her agent. There is no evidence that either sum was placed in his hands for investment. He does, indeed, suggest the purchase of a bond and mortgage, 'if the opportunity was found,' but not then even if the plaintiff wished to 'make any other use of the money,' and as to that he asked to be informed. It does not appear that such information was given. The testator did not constitute himself a trustee, or express an intention to become one; and the relation between the parties, as to the money in his hands, is to be implied from the mere fact that the money belonged to the plaintiff. He assumed no duty nor was he requested to assume a trust. There are no words showing that the money was so taken, nor any evidence that the plaintiff desired an investment or in any way assented to his suggestion, but if the contrary should be assumed, that his suggestion to put the money out on bond and mortgage had been accepted by the plaintiff, the presumption would be that in accordance with the duty thus imposed the instrument would be taken in her name, and there is no claim that he

made any in his own name or took security to himself. The letter is a mere admission of the receipt of the money mentioned in it. It was payable at once, and the fact that it bore interest did not prevent the statute of limitations from beginning to operate. (*Wenman v. Mohawk Ins. Co.*, 13 Wend. 267.) Its passage as to either item was not obstructed. That statute was, we think, an answer to the first cause of action.

"As to the second cause of action the court held there was not evidence sufficient to sustain a finding for plaintiff."

William G. Wilson for plaintiff.

Charles E. Miller for defendant.

DANFORTH, J., reads for reversal and new trial
All concur, except RUGER, Ch. J., not voting.
Judgment reversed.

CATHARINE ANN McCLUNG, as Administratrix, etc., Appellant,
v. MARY A. FOSHOUR et al., Respondents.

(Submitted March 15, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 15, 1887, which reversed a judgment in favor of plaintiff, entered upon the report of a referee, and granted a new trial.

D. W. Sparling for appellant.

E. Ritzema De Grove for respondents.

Agree to affirm and for judgment absolute for defendants;
no opinion.

All concur.

Judgment accordingly.

SAMUEL H. KISSAM, as Executor, etc., Respondent, *v.* JOHN
CONSALUS, as Surviving Executor, Appellant.

(Argued March 18, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made at the November Term, 1886, which modified and affirmed, as modified, a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

E. F. Bullard for appellant.

Edgar T. Brackett for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

BRYAN J. O'DONNELL, as Administrator, etc., Appellant, *v.*
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD
COMPANY, Respondent.

(Argued March 18, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made November 15, 1887, which affirmed a judgment in favor of defendant, entered upon an order nonsuiting the plaintiff on trial.

Louis Marshall for appellant.

Frank H. Hiscock for respondent.

Agree to affirm; no opinion.

All concur, except RUGER, Ch. J., ANDREWS and DAN-
FORTH, JJ., dissenting.

Judgment affirmed.

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THE FIRST GENERAL OR SIX PRINCIPLE BAPTIST SOCIETY OF
WILLETT, Appellant, v. AARON B. LOOMIS, as President of
THE FREE WILL BAPTIST SOCIETY OF WILLETT, Respondent.

(Argued March 19, 1889; decided April 16, 1889.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made November 23, 1888, which reversed an order of Special Term denying a motion by defendant to vacate an attachment and granted said motion.

Franklin Pierce for appellant.

W. J. Mantanye for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

ALMIRA LEE, Appellant, v. THE CO-OPERATIVE LIFE AND
ACCIDENT ASSOCIATION OF THE UNITED STATES, Respondent.

(Submitted March 19, 1889; decided April 16, 1889.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made November 23, 1888, which reversed an order denying a motion by defendant to vacate an attachment and granted said motion.

Abel Crook for appellant.

Leeds & Morse for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

JAMES R. BOWLES, as Administrator, etc., Respondent, *v.* THE
ROME, WATERTOWN AND OGDENSBURG RAILROAD COMPANY,
Appellant.

(Submitted March 20, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made September 21, 1887, which affirmed a judgment in favor of plaintiff, entered upon a verdict and an order denying a motion for a new trial.

Edmund B. Wynn for appellant.

A. Walker Otis for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

In the Matter of the Judicial Settlement of the Accounts of
WILLIAM H. HOLLISTER et al., as Executors, etc.

(Argued March 20, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made the first Tuesday of February, 1888, which affirmed a decree of the surrogate of the county of Greene upon the final accounting of the executors of Osmer Hollister, deceased.

John A. Griswold for appellant.

A. T. Clearwater for respondent.

Agree to reverse judgment of General Term and decree of surrogate on opinion of PARKER, J., below, and case remitted to surrogate for further proceedings.

All concur, except ANDREWS, DANFORTH and GRAY, JJ., dissenting.

Judgment reversed.

113 644
124 515

TACIE MCD. HARPER, Appellant, *v.* LILLIE DOWDNEY et al.,
as Administrators, etc., Respondents.

No tax or assessment is a lien or incumbrance within the meaning of a covenant against them until the amount thereof is ascertained or determined.

Where, therefore, prior to the execution and delivery of a deed of premises in the city of New York containing such a covenant, the work of paving a street had been completed by the city pursuant to an ordinance of the common council duly passed and the expense of the work paid by the city, but the apportionment of the amount upon the persons and property benefited was not made until thereafter, when a proportion thereof was assessed upon the premises conveyed and was paid by the grantee. *Held*, that an action upon the covenant to recover the amount so paid was not maintainable.

(Argued March 22, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, made February 20, 1888, in favor of defendant, entered upon an agreed case submitted under section 1279 of the Code of Civil Procedure.

The facts submitted were, in substance, these: In December, 1881, the common council of the city of New York duly passed an ordinance pursuant to its charter (Chap. 335, Laws of 1873), see, also, Consolidation Act (Chap. 404, Laws of 1883), that a specified portion of Fifth avenue be paved with granite block, and that for a more speedy execution of the work it be done by the city. The work was completed in November, 1882, and in December of that year the commissioner of public works certified the amount of the expenses and that the work had been completed and accepted, and in January, 1883, the contractor was duly paid by the city. In April, 1883, defendant's intestate conveyed to plaintiff certain premises by deed, containing a covenant that they were free, clear and discharged of all "charges, * * * taxes, assessments and incumbrances," excepting a mortgage specified. In November, 1883, an apportionment of the expenses of the improvement was made and \$964.30 thereof was assessed upon the premises conveyed, which was paid by plaintiff. The

question was as to whether the facts constituted a breach of the covenant.

The following is the *mem.* of opinion :

"Facts substantially like those presented in this case, so far as the assessment proceedings are concerned, were brought before us by Abraham Dowdney in his action against the city of New York (54 N. Y. 186), and upon similiar covenants they raised the same question of law. The Supreme Court was of the opinion that the covenants gave no right to the relief sought, and so far this court agreed, but upon other circumstances of the case, admitted by demurrer, the courts differed and the plaintiff action was maintained. Those circumstances do not exist here, and the principle enunciated by both courts, in deciding the first point, was not, as the appellant's counsel supposes, '*obiter*,' but essential to the decision then made. The rule there declared is easily understood and plain in its application. It was held that no tax or assessment could exist so as to be a lien or incumbrance within the meaning of a covenant against them until the amount thereof should be ascertained or determined. To the same effect is our decision in *Lathers v. Keogh* (109 N. Y. 583). In the case at bar this was not done until November 27, 1883, when the apportionment was made and the assessment imposed upon the premises. The contract was merged in the deed, and the deed was executed and delivered in April preceding this apportionment. There was, therefore, neither a breach of contract nor of the covenant.

"Consequently, the appeal fails and the judgment of the court below should be affirmed."

Robert E. Deyo for appellant.

Horace K. Dougherty for respondent.

DANFORTH, J., reads for affirmance.

All concur.

Judgment affirmed.

OLIVE ARMS, Respondent, *v.* WM. D. ARMS, as Executor, etc.,
Appellant.

(Argued March 22, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made January 10, 1888, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was upon a promissory note. The only question of importance presented here was as to whether the trial court should have submitted to the jury to decide upon the genuineness of the note sued upon, which said court declined to do. The court here held that the evidence did not require such a submission.

Watson M. Rogers for appellant.

Levi H. Brown for respondent.

PECKHAM, J., reads for affirmance.

All concur.

Judgment affirmed.

EDITH STORM et al., Respondents, *v.* THOMAS STORM et al., as
Executors, etc., Appellants.

(Submitted March 26, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 31, 1886, which affirmed a judgment in favor of plaintiffs, entered upon a decision of the court on trial at Special Term.

William A. Boyd and *Fred. W. Diehl* for appellants.

Theodore W. Dwight for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

LOVENTIA L. MURPHY, as Administratrix, etc., Respondent, v.
JOSHUA S. LOOMIS, Appellant.

(Submitted March 22, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made January 13, 1884, which affirmed a judgment in favor of plaintiff, entered on a verdict, and affirmed an order denying a motion for a new trial.

Watson M. Rogers for appellant.

F. N. Fitch for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
JOHN KELLY, Appellant.

The provision of the Code of Criminal Procedure (§ 528, as amended by Chap. 498, Laws of 1887), authorizing this court, on appeal, in a criminal action "when the judgment is of death" to order a new trial if "satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below," does not authorize a review of findings of fact of a jury, founded on sufficient evidence, or a reversal simply because of a difference of opinion on the facts between the court and the jury; it simply invests the court with power to order a new trial where, upon a consideration of the whole case, it is manifest injustice has been done, although the question has not been properly raised by exceptions.

After a witness for the prosecution, on the trial of an indictment for murder, who had witnessed the homicide, had testified to the circumstances attending it, and had shown in his testimony a disposition to favor the prisoner, the district attorney, with the avowed purpose of refreshing his recollection, asked him if he had not previously testified to certain other facts specified. The witness admitted that he had so testified, and upon being asked if it was true, answered that it was. *Held*, that the method pursued to refresh the witnesses' recollection was proper.

B	647
125	144
125	741
113b	647
128	631
113b	647
143	367

113b	647
147	214
j 148	506

113b	647
158	575

113b	647
157	195

157	596
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113b	647
164	468

113b	647
168	577

113b	647
168	577

It is not sufficient to excuse a person from the consequences of a fatal assault upon another, that he was provoked thereto by an angry controversy of words alone, however aggravating, and when the parties are unequal in strength, and the assaulting party being the stronger, and having no reason to apprehend physical injury from the other, uses a dangerous weapon, the question whether it was used with homicidal intent is one of fact for the jury.

(Argued March 27, 1889; decided April 16, 1889.)

The following are extracts from the opinion herein :

"The defendant was indicted for the crime of murder in the first degree for killing one Eleanor O'Shea, by striking her on the head with a hammer, at the town of Geneva in the county of Ontario, on the 6th day of November, 1888. At a trial in the Court of Oyer and Terminer, held in said county in December, 1888, the defendant was convicted of the crime charged, and, in pursuance of the provisions of the Code of Criminal Procedure as amended by chapter 493 of the Laws of 1887, has appealed directly to this court from the judgment entered upon his conviction. Upon such an appeal we are required to examine the whole case and determine whether, in our opinion, 'the verdict was against the weight of evidence, or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below.'

"We do not think that this provision was intended to authorize this court to review findings of fact, founded upon sufficient evidence, made by the jury, or to reverse judgments simply because of a difference of opinion on the facts between this court and the jury; but it was intended to invest the court with the power of ordering a new trial in cases where, upon a consideration of the whole case, it is manifest that injustice has been done, although the question has not been properly raised by exceptions in the court below. (*People v. Cignarale*, 110 N. Y. 23.)

"This provision undoubtedly gives great latitude of authority to the court in granting new trials to convicted offenders, but it is an authority which must be exercised under the restraint of settled rules and in accordance with established principles of law regulating and defining the duties of appellate tribunals in reviewing the judgments of trial courts. It

is claimed that a consideration of the evidence shows a lack of proof of that premeditation and deliberation in the commission of the offense, which is required by the statute to sustain a conviction.

"There is no serious question in the case but that Eleanor O'Shea came to her death in consequence of a blow inflicted with an iron hammer upon her head by John Kelly, or but that the blow was intentionally given for the purpose of inflicting serious bodily injury upon said O'Shea. The principal question in the case is the determination of the particular intent with which the defendant struck the blow. This can be ascertained only by an examination of the facts proved on the trial."

After a full consideration of the testimony, the opinion continues:

"Upon this evidence it was, we think, a fair question for the jury to determine whether the death of O'Shea was produced by that degree of deliberation and premeditation which rendered it murder in the first degree. So far as this case is concerned the inquiry is, whether the evidence established the fact that Eleanor O'Shea was killed from a deliberate and premeditated design to effect her death. (Penal Code, § 183.) If she was, then the defendant was guilty of murder in the first degree and was properly convicted of the offense. It is not sufficient to excuse a person from the consequences of a fatal assault upon another, that he has been provoked thereto by an angry controversy of words alone, however aggravating they may have been; but when such language induces a personal conflict of strength between parties of comparatively equal ability to inflict injury, the seizure of a dangerous weapon, accidentally near, by one of the parties, and a blow given in the heat of passion, might be regarded by a jury as excusable. This, however, is not the rule when the parties are unequal in strength and the assaulting party has no reason to apprehend physical injury from the other. Here the violence was initiated by the defendant, and, although he had no reason to anticipate adequate resistance, it was followed up and continued after his adversary had been silenced and disarmed.

"That there was abundant evidence of deliberation and premeditation in striking the blow which caused death we do not consider a debatable question in the case, but whether it was delivered with homicidal intent is a question about which some difference of opinion might exist. We think, however, upon the whole evidence, that the jury, who saw the parties and their witnesses and heard their evidence and could judge of their intelligence and credibility, had better opportunities for arriving at a correct conclusion in respect to the question than an appellate tribunal possesses.

"The evidence that the affray had apparently terminated and O'Shea retired to the corner of the room most remote from Kelly, with an evident intent to avoid him, and that he then sought her out, after an opportunity to reflect upon his course of action, with the obvious purpose of continuing the affray, armed with a new and dangerous weapon, is very persuasive proof of a deliberate and determined purpose on his part. (*People v. Sullivan*, 7 N. Y. 396.) It is obvious that Kelly never considered himself in danger of bodily harm from O'Shea; he had silenced her tongue and she showed no disposition to renew the controversy, and all apparent reason for continuing it had ceased except a purpose on his part to inflict punishment upon her. He then, apparently, armed himself with the hammer, a dangerous if not deadly weapon, and proceeded across the room to attack a defenseless and unresisting woman, not possibly with the intention of striking her in the first instance, but evidently with a view of compelling, in some way, a retraction of her charges against him. In the event that she refused, it was a natural inference, from the evidence, that he intended to strike her on the head, a vulnerable and vital spot, with the consequences which would naturally follow from such a blow. It is not possible that he could have supposed it would be harmless, and it is difficult to see how he could have expected it would be otherwise than fatal. The indifference with which he witnessed her struggle to reach the pantry and his peremptory disposition of Mahar for the night, thus removing the only person from the house who was friendly to the deceased and capable and willing to render assistance in

her extremity, showed cruel disposition and a reckless disregard of human life, and bore strongly upon the intent with which the blow was inflicted. That he considered the provocation given to him by O'Shea a sufficient reason for killing a human being was ostentatiously avowed by him immediately after the affray, and might fairly have been considered by the jury as an attempted justification of consequences which he then apprehended and probably premeditated. The hindrance which O'Shea had for a long time presented to the continuance of his illicit intercourse with his paramour furnishes a motive for the crime, which might have been considered by the jury sufficiently strong to induce him to attempt the life of the deceased.

"We are, therefore, on the whole case, of the opinion that the evidence supports the verdict of the jury, and that there is no sufficient reason in the facts of the case to authorize the conclusion that injustice has been done the defendant by the judgment appealed from.

"The only other point made by the appellant of any importance is that raised by the objection to questions put to the witness Mahar by the People respecting testimony previously given by him before the committing magistrate and the grand jury. Mahar had omitted to testify in detail to the movements of Kelly between the time when the deceased returned to the kitchen and the infliction of the fatal blow. With the obvious and avowed purpose of refreshing his recollection, the district attorney asked whether he had not previously sworn that Kelly moved coolly across from the north-east to the south-west corner of the room where O'Shea stood; and, also, whether Kelly did not then address her in a low and quiet tone of voice. The witness admitted that he so testified, and, upon the further question as to whether that was the fact, he answered that it was. This was certainly quite material evidence, and, if it was true, was competent on the part of the People. The fact that he omitted to testify to it on his direct-examination must be ascribed either to his forgetfulness or a disposition to befriend the accused by its suppression. He had given no evidence conflicting with this statement, and it tended in no

degree to contradict his testimony. The manner in which it was drawn out might affect the credibility of the witness with the jury, but, having affirmed the truth of the facts aside from his admissions as to his testimony on the previous occasion, it was the province of the jury to give such credit to his evidence as it was entitled to.

"We are of the opinion, within the rule laid down in *Bullard v. Pearsall* (53 N. Y. 230), that it was proper for the People to refresh the recollection of the witness in the manner pursued in this case."

Edwin Hicks for appellant.

Frank Rice for respondent.

RUGER, Ch. J., reads for affirmance.

All concur.

Judgment affirmed.

ABRAHAM R. VAN NEST, Appellant, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

(Argued March 28, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made April 8, 1886, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term.

George G. Munger for appellant.

William C. Turner for respondent.

Agree to affirm on decisions in *Diefenthaler v. Mayor, etc.*, (111 N. Y. 331) and *Phelps v. Mayor, etc.* (112 id. 216); no opinion.

All concur.

Judgment affirmed.

BETSY TONKINS, as Administratrix, etc., Respondent, *v.* THE
NEW YORK FERRY COMPANY, Appellant.

(Argued March 29, 1889; decided April 16, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made the first Monday of February, 1888, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

Peter C. Hendrick for appellant.

James C. Foley for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

CHARLES E. HUBBELL et al., Appellants, *v.* DANIEL BUHLER
et al., Respondents, Impleaded, etc., et al., Appellants.

(Argued March 19, 1889; decided April 28, 1889.)

APPEAL from order of General Term of the Supreme Court in the fourth judicial department, made November 13, 1888, which reversed in part an order of Special Term upon hearing of exceptions to report of a referee stating accounts of receiver; also, appeal from an order of said General Term of same date reversing an order of Special Term denying a motion to resettle the order of General Term first appealed from.

W. G. Tracy for Hubbell et al., appellants.

Payson Merrill for Richards et al., appellants.

A. R. Dyett for respondents.

Agree to reverse on opinion of WILLIAMS, J., below.

All concur, except RUGER, Ch. J., who reads for affirmance,
and DANFORTH, J., concurring.

Order reversed.

LIZZIE GUIBERT, Respondent, *v.* CARRIE P. SAUNDERS et al.,
Respondents et al., Appellants.

(Submitted April 16, 1889; decided April 23, 1889.)

MOTION to dismiss an appeal from a decision of the General Term of the Supreme Court in the first judicial department, which affirmed an interlocutory judgment, entered upon a decision of the court at Special Term.

James M. Hunt for motion.

Alfred B. Cruikshank opposed.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

JOHANNA FRANK, as Administratrix, etc., Respondent, *v.*
IRA L. OTIS et al., Appellants.

(Argued April 15, 1889; decided May 3, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made April 14, 1888, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and an order denying a motion for a new trial.

Edward Harris for appellants.

C. D. Kiehel for respondent.

Agree to affirm; no opinion.

All concur, except FINCH and GRAY, JJ., dissenting.

Judgment affirmed.

THOMAS M. KING et al., Respondents, v. REON BARNES et al.,
Appellants.

(Argued April 16, 1889; decided May 3, 1889.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made February 11, 1889, which affirmed an order of Special Term appointing a receiver of the New York Transit and Terminal Company (Limited).

William B. Hornblower for appellants.

William W. Mac Farland for respondents.

Agree to affirm; no opinion.

All concur.

Order affirmed.

THOMAS M. KING et al., Appellants, v. REON BARNES,
Impleaded, etc., Respondent

(Argued April 16, 1889; decided May 3, 1889.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made February 11, 1889, which denied a motion to dismiss an appeal from an order providing for the taking of oral testimony in contempt proceedings before a referee.

William W. Mac Farland for appellants.

William B. Hornblower for respondent.

Agree to dismiss; no opinion.

All concur.

Appeal dismissed.

THOMAS M. KING et al., Respondents, *v.* JOHN H. POST,
Impleaded, etc., Appellant.

(Argued April 16, 1889; decided May 8, 1889.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made February 11, 1889, which affirmed an order of Special Term punishing the defendant, John H. Post, for contempt.

William B. Hornblower for appellant.

William W. MacFarland for respondents.

Agree to affirm ; no opinion.

All concur.

Order affirmed.

In the Matter of the Application of MARY E. HYNES, as
General Guardian, etc., of WILLIAM R. HYNES et al.,
Infants, for Leave to sell Real Estate of said Infants.

(Argued April 16, 1889; decided May 8, 1889.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made January 28, 1889, which reversed an order of Special Term correcting and amending a former order.

David McClure for appellant.

Truman H. Baldwin and *W. H. Secor* for respondent.

Agree to affirm ; no opinion.

All concur, except RUGER, Ch. J., not voting.

Order affirmed.

SUSIE N. CADY, as Administratrix, etc., Respondent, *v.* THE
MERCHANTS' BANK OF ROCHESTER, Impleaded, etc.,
Appellant.

(Argued April 17, 1889; decided May 3, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of January, 1888, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

William Nathaniel Cogswell for appellant.

Charles B. Keeler for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

MARIA THORNTON et al., as Executors, etc., Respondents, *v.*
ISAAC HARRIS et al., as Executors, etc., Appellants.

(Argued April 17, 1889; decided May 3, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 14, 1886, which affirmed a judgment in favor of plaintiffs, entered upon a verdict.

John McCrone for appellants.

Anthony Barrett for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

In the Matter of the Judicial Settlement of the Accounts of
BYRON D. McALPINE et al., as Executors, etc.

BYRON D. McALPINE et al., as Executors, etc., Appellants. v.
CHARLES B. POTTER, Respondent.

(Argued April 18, 1889; decided May 8, 1889.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made March 27, 1888, which reversed a decree of the Surrogate's Court of Monroe county upon a judicial settlement of the accounts of the executors of Henry S. Potter, deceased.

Spencer Clinton for appellants.

S. D. Bentley for respondent.

Appeal dismissed on argument.

MINNIE B. BROWN, Respondent, v. NATHAN C. PHELPS, as
Executor, etc., Appellant.

(Submitted April 18, 1889; decided May 8, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 17, 1888, which affirmed a decree of the Surrogate's Court of Oneida county, requiring the executor of Milo Mitchell, deceased, to pay a legacy to plaintiff.

Walter Ballou for appellant.

John S. Baker for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

ELIZA MERWIN, as Administratrix, etc., Respondent, v. THE
MANHATTAN RAILWAY COMPANY, Appellant.

113a	659
149	842
113	659
Case 1	
e173	569

(Argued April 19, 1889; decided May 8, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 22, 1888, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and an order denying a motion for a new trial.

Edward S. Rapallo for appellant.

Thomas P. Wickes for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

MARY LEE, as Administratrix, etc., Appellant, v. BARROW
STEAMSHIP COMPANY, etc., Respondent.

(Argued April 19, 1889; decided May 8, 1889.)

APPEAL from judgment of the General Term of the Court of Common Pleas in the city and county of New York, entered upon an order made April 4, 1887, which reversed a judgment in favor of plaintiff, entered upon a verdict, and granted a new trial.

A. G. Vanderpoel for appellant.

Frederick D. Gedney for respondent.

Appeal dismissed on argument.

113 660
123 296ALLEN A. PERKINS, Appellant, v. THE STATE OF NEW YORK,
Respondent.

While the fact that the commissioners of the Board of Claims, under the act of 1888 (Chap. 205, Laws of 1888), are required to view premises claimed to have been damaged by the state, and to act to some extent upon their own judgment, does not deprive this court of the power to review their award upon the question of damages; yet, as they may and must base their award upon knowledge derived from that view as well as the evidence of witnesses, unless it appears that they adopted some erroneous rule of damages, or the evidence and their findings show that they have misconceived the facts, and erred in their estimate, their award will not be interfered with.

(Submitted April 23, 1889; decided May 3, 1889.)

APPEAL from an award made by the Board of Claims November 20, 1884. The claim was presented under the act chapter 205, Laws of 1883, for damages to claimant's land by the flowing of water, caused by raising the dam across the Susquehanna river at Binghamton.

After stating the substance of the testimony, the opinion then proceeds as follows:

"The requirement that the commissioners of the Board of Claims should view the premises was inserted in the statute for some purpose. The view which they are required to make is not a mere idle ceremony. It is intended to aid their judgment on the question of damages, and to enable them to appreciate the evidence and give to it its proper weight. They are not bound to be governed entirely by the evidence of witnesses but they may base their award, and must base it, upon the knowledge derived from that view and the evidence of the witnesses. Such has been the uniform practice under similar statutes. (*Matter of William and Anthony Streets*, 19 Wend. 678, 695; *Matter of Rondout & Oswego R. R. Co.*, 5 Lans. 298; *Matter of Boston Road*, 27 Hun, 409; *Matter of Staten Island Rapid Transit Co.*, 47 id. 396; *Matter of City of Buffalo*, 1 N. Y. State Rep. 742; *Matter of P. P. & C. I. R. R. Co.*, 85 N. Y. 489, 494.)

"Under the general laws applicable to the city of New York in street opening cases, and under the general railroad act of 1850, and numerous other acts, commissioners of estimate and

appraisement are required to view the lands in reference to which their action is invoked, as well as to receive evidence. They are selected from their supposed competency to deal with the matters submitted to them, and are impartial, and generally they must be as well qualified as any three witnesses to form a judgment, from their personal view and examination, of the damages which ought to be awarded. The basis upon which damages are to be estimated is frequently very uncertain, and estimates of friendly witnesses upon questions of value and damage must frequently be prejudiced, uncertain and unreliable, and hence it is a wise provision of law which requires the commissioners in such cases to view the premises and take ocular proof of their condition. Here the commissioners had for consideration what their own eyes could see upon the lands, the fact that the plaintiff's witnesses had no reliable basis for their estimate of damages, as they varied in their estimates from \$5,000 to upwards of \$10,000, the fact that the claimant a few years before bought the land at from \$250 to \$300 per acre, and the evidence of the single witness that the land had not really been damaged. Under such circumstances, we do not think that there is such a case upon this appeal as requires this court to reverse the award on the ground of its insufficiency.

"The fact that the commissioners are required to view the premises and to act to some extent upon their own judgment, informed by ocular evidence, does not deprive this court of the power to review their award upon the question of damages. They may adopt some erroneous rule of damages, and their findings may be such, and the case, upon all the evidence, may be such as to show that they misconceived the facts and erred in their estimate. We cannot say that this is such a case, and the award should, therefore, be affirmed, with costs."

D. C. Richards for appellant.

Charles F. Tabor, attorney-general, for respondent.

EARL, J., reads for affirmance.

All concur.

Award affirmed.

113	663
119	610

JOSEPH S. COHU et al., Administrators, etc., Respondents, v.
JOSEPH HUSSON, Appellant.

In an action upon a promissory note the complaint set forth the note and alleged that plaintiffs were the owners thereof, but did not allege that it was executed by defendant or that any specified sum was due plaintiff thereon as required by the Code of Civil Procedure (§ 534). The answer admitted the execution of the note by defendant; it did not allege payment, but set up as a defense want of consideration. *Held*, that if the complaint would have been held defective on demurrer, the defect was cured by the answer; and that the complaint might be deemed amended. The complaint averred that letters of administration were duly issued and granted to plaintiffs by the surrogate of the county of New York and that they duly qualified. *Held*, sufficient; that it was not necessary to set forth the facts showing the surrogate had jurisdiction.

(Argued April 19, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made April 11, 1887, which affirmed a judgment in favor of plaintiffs, entered upon a verdict and affirmed an order denying a motion for a new trial.

The following is an extract from the opinion :

“This action was brought to recover upon a promissory note, of which the following is a copy :

‘\$750.00. NEW YORK, *December* 11, 1878.

‘Five months after date I promise to pay to the order of Mr. Henry S. Cohu, seven hundred and fifty dollars at the Brooklyn Bank, in the city of Brooklyn, value received.

‘NEW YORK, 11-14-’79.

‘JOSEPH HUSSON.’

“The defendant, in his answer, did not deny any of the allegations of the complaint, but alleged, for a first defense, that the note set up in the complaint had no legal inception; that it was given to plaintiffs’ intestate for his accommodation in exchange for a note of the same tenor given by him to the defendant, which note had not been paid by him, or by the plaintiffs, as his executors, and that they did not hold the same.

For a second defense, the defendant alleged that the intestate made his promissory note, of which the following is a copy :

‘NEW YORK, August 11, 1879.

‘Two months after date I promise to pay to the order of Joseph Husson, seven hundred and fifty dollars, at —, value received.

‘HENRY S. COHU.’

“And that he delivered the same, for value, to the defendant, who has ever since been the owner and holder thereof, and that the same has never been paid.

“In their reply the plaintiffs denied that the note set forth in the answer had any legal inception ; and alleged that it was one of a series of notes given by the intestate to the defendant without consideration, and purely for his accommodation.

“At the opening of the case, upon the trial, defendant's counsel moved to dismiss the complaint upon the ground that it did not, upon its face, set forth facts sufficient to constitute a cause of action. The motion was denied, and the defendant excepted. It is true that the complaint is not in compliance with section 534 of the Code, as it does not state that there is due to the plaintiffs on the note from the defendant a specified sum which they claim. They simply allege that they are the lawful owners and holders of the note, and set it out. They do not allege that it was executed by the defendant ; nor do they allege that any sum whatever is due thereon to them. But this defect in the complaint is cured by the answer, in which the execution of the note by the defendant is admitted. and there is no allegation that it has been paid. Therefore, even if the complaint would have been held defective, if demurred to, the defect was cured by the answer, and the complaint may now be deemed amended. (Code, §§ 721-723 ; *Bate v. Graham*, 11 N. Y. 237 ; *Pratt v. H. R. R. Co.*, 21 id. 305 ; *Haddow v. Lundy*, 59 id. 328.)

“It was also claimed that the complaint was defective because it did not allege facts showing that the surrogate of New York county, by whom plaintiffs were appointed administrators, had jurisdiction to appoint them. But the allegation

in the complaint is that the letters of administration were duly issued and granted to the plaintiffs by the surrogate appointing them administrators of all the goods, chattels and credits of the deceased, and that they duly qualified as such, and entered upon the duties of their office. These allegations must be held sufficient as against an extremely technical objection taken for the first time at the trial.

"Upon the trial it was substantially undisputed that the plaintiffs were entitled to recover upon the note set forth in the complaint. They held that note, and it was also proved that they held a note signed by their intestate, payable to defendant's order of the same date, for the same amount, payable at the same time and the same place, which had on it the indorsement of the defendant and other indorsements showing that it had been discounted and used. The evidence showed that these notes were, at their date, exchanged by the parties for their mutual accommodation; and it appeared that Cohn did not use the note given to him, and that the defendant did use and have the benefit of Cohn's note, but that he did not pay the same. So it is clear that these plaintiffs were entitled to recover upon the note set forth in the complaint."

The balance of the opinion is taken up with a discussion of the facts proved to sustain the counter-claim set forth in the answer and the defense thereto. The court coming to the conclusion that the evidence was sufficient to sustain the defense.

Edward P. Wilder for appellant.

Abram Kling for respondents.

EARL, J., reads for affirmance.

All concur.

Judgment affirmed.

GEORGE H. CLARK, as Administrator, etc., Respondent, v.
JOHN W. HANNAN, Appellant.

(Argued April 22, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of January, 1888, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirmed an order of Special Term denying a motion for a new trial.

Adelbert Moot for appellant.

David N. Salisbury for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

DYCKMAN WALDRON, as Executor, etc., Respondent, v. CHARLES
SOHLANG, Appellant.

(Argued April 22, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 19, 1888, which directed a judgment in favor of plaintiff upon a case submitted under section 1279 of the Code of Civil Procedure.

James M. Baldwin for appellant.

John K. Van Ness for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

BENJAMIN F. UNDERHILL et al., Individually and as Executors, etc., Respondents, v. SARAH A. UNDERHILL et al., Impleaded, etc., Appellants.

(Argued April 23, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 14, 1886, which affirmed an interlocutory judgment in favor of plaintiffs, entered upon a decision of the court on a trial without a jury.

Thomas Nelson for appellants.

Theodore Fitch for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

MARIA M. KNAPP, as Executrix, etc., Respondent, v. HARRY HOLLINS, JR., et al., Impleaded, etc., Appellants.

(Argued April 23, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 15, 1888, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

Alfred E. Mudge for appellants.

Joseph A. Burr, Jr., for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

THE CORN EXCHANGE BANK OF CHICAGO, Respondent, v.
ALPHONSO W. BLYE, as Receiver, etc., Appellant.

(Argued April 23, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made the first Monday of March, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict directed by the court.

Samuel B. Clarke for appellant.

L. A. Gould for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

MARY CULLEN, as Administratrix, etc., Respondent, v. THE
PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE
AND HUDSON CANAL COMPANY, Appellant.

113	667
120	293
113	667
124	815
113	667
136	306
113	667
Case 2	
e 78 AD	406

The neglect of the employes of a railroad company to ring the bell or blow the whistle of an engine approaching a crossing does not excuse a traveler on the highway from exercising care on his part, in looking and listening before crossing the railroad tracks, in order to escape the danger of moving trains.

(Argued April 24, 1889; decided June 4, 1889.)

APPEAL from an order of the General Term of the Supreme Court in the third judicial department, made January 26, 1886, which reversed a judgment entered upon an order nonsuiting plaintiff on trial, and granted a new trial.

This action was brought to recover damages for alleged negligence causing the death of Michael Cullen, plaintiff's intestate, who was killed at a crossing on defendant's road by a collision with an engine which was backing at a high rate of speed and approached the crossing from the south without ringing the bell, blowing the whistle or giving any notice.

The deceased was driving a young horse attached to a wagon, and, as testified to by plaintiff's witness, approached the crossing without slackening his speed and without looking in the direction from which the engine was approaching until he got upon the tracks. It appeared indisputably that from a point seventy feet from the crossing the track to the south could have been seen for one hundred and forty-six feet by the deceased, if he had looked, and fifty feet from the crossing he could have seen it for two hundred and twenty feet.

The court held the nonsuit was properly granted.

The following is an extract from the opinion :

"It seems very plain that the duty which rests upon a traveler in approaching a railroad crossing, to look and listen, was not discharged by the intestate. It may be said that he was thrown off his guard by not hearing the engine; by the omission of the defendant's servants to ring the bell or sound the whistle; by the fact that engines or trains were seldom moved on this road on Sunday, and, in addition, it is urged that he could not have looked south without partially turning around, and that if he had seen the engine he would have difficulty in turning his wagon in the highway at that point. But we cannot listen to these suggestions without opening the door to excuses which in the end would subvert the rule which, on the whole, tends, we think, to protect life, viz., that the omission of a railroad company to perform its duty, under circumstances like these, does not justify a traveler on a highway in not observing care on his own part by looking and listening before crossing a railroad track, in order to escape the danger of moving trains. There is no evidence that the intestate did look or listen. On the contrary, the strong inference from the evidence is that he neither looked nor listened, and there is no reasonable ground for the supposition that he was in a position where he had to choose between imminent perils, and that he could not have escaped one without encountering the other.

"We think the judgment of the General Term should be reversed and the judgment of nonsuit affirmed."

Edwin Young for appellant.

A. D. Wait for respondent.

ANDREWS, J., reads for reversal of order of General Term and for affirmance of judgment.

All concur, except DANFORTH, J., dissenting, and PECKHAM, J., not voting.

- Order reversed and judgment affirmed.

MARY C. REMER, as Administratrix, etc., Respondent, *v.* THE LONG ISLAND RAILROAD COMPANY, Appellant.

(Argued April 24, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 17, 1888, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

E. B. Hinsdale for appellant.

C. D. Rust for respondent.

Agree to affirm; no opinion.

All concur.

- Judgment affirmed.

HEZEKIAH PECK, Appellant, *v.* JULIA F. KIETZ, as Administratrix, etc., Respondent.

(Argued April 24, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made May 1, 1888, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term.

J. M. Dunning for appellant.

J. D. Decker for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

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117	510
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124	649
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THOMAS B. CLARK, an Infant, by Guardian ad litem, Respondent, v. THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Appellant.

(Submitted April 25, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 1, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

James H. Stevens for appellant.

Leslie W. Wellington for respondent.

Agree to affirm; no opinion.

All concur, except EARL, J., not voting.

Judgment affirmed.

LOUIS BOLDT, an Infant, by Guardian, etc., Respondent, v. WILLIAM D. MURRAY, Appellant.

(Argued April 25, 1889; decided June 4, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of June, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirmed an order denying a new trial.

William B. Hoyt for appellant.

George M. Osgoodby for respondent.

Agree to affirm on opinion of BRADLEY, J., below.

All concur.

Judgment affirmed.

GEORGE W. CHAPLIN, Appellant, v. THE STATE OF NEW YORK
Respondent.

(Argued April 25, 1889; decided June 4, 1889.)

APPEAL from an award of the Board of Claims made June
25, 1885.

G. W. Bowen for appellant.

Charles F. Tabor, attorney-general, for respondent.

Agree to affirm; no opinion.

All concur.

Award affirmed.



INDEX.

ACCOUNTING.

1. In an action for an accounting between partners, it appeared that no time was fixed by the articles of copartnership for its continuance. An account of stock was taken and balance struck as of December 31, 1873, with the understanding between the partners that the partnership was to be dissolved and the business wound up; it was not, however, formally dissolved until March 13, 1874, when an agreement of dissolution was entered into between them, by which defendant B. was given and took charge of the assets, with authority to collect and dispose of the same and to pay the firm debts, and he alone was authorized to sign in liquidation. Prior to December 31, 1873, \$3,000 had been paid out of the copartnership funds on account of defendant G., but had not been charged in account. This sum was on that day, without the knowledge or consent of plaintiff, charged to the account of G. and then was credited to that account and charged to profit and loss, thus leaving an apparent balance of capital due to G.; this he thereafter, but before the final dissolution, drew out. In the accounting the referee charged this sum to B. as the liquidating partner. *Held*, error; that until March 13, 1874, when the dissolution agreement was executed and B. took exclusive charge, he had no more authority or control than the other partners, and so could not be made responsible for the acts of G. *Leserman v. Bernheimer.* 39

2. Also, *held*, that in adjusting the capital accounts between the parties it was proper to allow interest

upon the balances standing to their credit down to March 13, 1874. *Id.*

3. An action was commenced against the copartners in December, 1873, for an alleged infringement of a patent by the firm, and counsel were employed by it to defend. The action was continued until October, 1876, when it was compromised and release given by the plaintiff therein. B. paid the expenses and disbursements in the defense of the action after the dissolution. It appeared that after L. had concluded to withdraw from the business, B. G. and one S. decided to organize a corporation to continue it. On March 13, 1874, B., as liquidating partner, leased to S. the property and works of the firm with an option to purchase contained in the lease. This was with the knowledge and approval of L., but it did not appear that he knew of the intent to form a corporation or that his copartners were to be members. The corporation was organized and B. transferred to it the bulk of the stock of the firm, and S., in exercise of the option, purchased the leased property for the benefit of the corporation. These transactions were set up in the pleadings, upon the accounting the sums paid for these transfers were stated and the adjustment was made on the basis of the prices received, without objection on the part of plaintiff, who then had full knowledge of all the facts. The referee found that the said release and settlement of the suit pending was brought about in part by the agreement of B. and G. not to carry on the business and the transfer of the stock in trade of the corporation to

- another corporation for a sum paid to B. and G., and for this reason the referee refused to allow B. for such expenses and disbursements. *Held*, error; that while plaintiff, on learning the fact that his former copartners were benefited by and interested as purchasers in the sales, might have rejected the adjustment of accounts on the basis of the price received, and either have shared in the profits, if any made by them, or repudiating the sales, have held the liquidating partner liable for the value of the property; having, after full notice, concluded to treat the sales as valid, this was a ratification thereof, and defendants were not required to answer concerning the disposition of the property, and their failure to do so was no reason for disallowing the expenses; that all he was entitled to was to have disallowed any portion of the expenses which were made for the exclusive benefit of the new corporation. *Id.*
4. B. also paid G. for services rendered by him in said suit after the dissolution. *Held*, that he was entitled to be allowed therefor. *Id.*
 5. Where conveyances of real estate, made by a judgment-debtor, have been set aside as fraudulent in an action brought by the judgment-creditors, and the grantee is called upon to account for the rents and profits, although adjudged to be a guilty participant in the fraud, he is entitled to be allowed on the accounting sums paid by him for taxes, interest on mortgages on the premises accruing while he occupied them, and repairs actually necessary for the preservation of the property and to keep the same tenable, but he is not entitled to be allowed for insurance premiums paid by him, save so much as has been adopted by and has inured to the benefit of the judgment-creditors. *Loos v. Wilkinson.* 485
 6. Such an accounting must be on equitable principles, and when the fraudulent grantor has been compelled to surrender the property and to account for all the profits, he has, could or ought to have made, the ends of justice have been obtained. *Id.*
 7. Where, in such a case, it appeared that the grantee paid interest on mortgages long past due, at the rate of seven per cent, as called for by the mortgages. *Held*, he was entitled to be allowed only the legal rate of interest. *Id.*
 8. The property so fraudulently transferred was very large and valuable; it was placed by the grantee in the hands of an agent who managed it and collected the rents. *Held*, that the grantee was entitled to be allowed the agent's commissions. *Id.*
 9. S. died in 1878 intestate, leaving him surviving a widow and a daughter, E., his only child and next of kin. The widow being deemed incompetent, on petition of E. letters of administration were issued to her and one N. They soon after made up between themselves an inventory, but none was filed until 1882. Most of the estate consisted of mortgages on real estate. E. allowed N. to have control of the assets, and as moneys were realized thereon, he loaned them on bonds and mortgages which were taken in E.'s name, individually. Other moneys were deposited in her name and were drawn upon by her as required. In 1882 N. failed, and thereupon E. took possession of the securities, and proceedings were instituted for an accounting by N. Upon the accounting N. credited himself with the investments so made on bonds and mortgages as payments to and for the use of E. The surrogate rejected this claim, and in his decree charged N. with the moneys represented by the securities, and required him to pay over to E., as next of kin, her distributive share thereof, and upon his complying with the decree required E. to transfer to him said securities. *Held*, error; that, conceding E. could refuse to accept or be bound by the securities as payments, she could not retain them, and at the same time claim that the items in the account representing them should be disallowed, but should have been required to transfer them to N. as a condition precedent to his being charged with the amounts; but, *held*, that assuming the investments

were irregular and constituted breaches of trust, in the absence of proof of fraud or misrepresentations, just so far as E. had the means of knowing of her co-administrator's acts and assented to or acquiesced in them, either expressly or by her passiveness, she was bound and was estopped from objecting thereto. *In re Niles*. 547

ACTION.

See CAUSE OF ACTION.

ACTS OF CONGRESS.

In an action to recover possession of certain railroad bonds which the complaint alleged were the property of plaintiff and of which defendant had become wrongfully and illegally possessed, these facts appeared: T., the original plaintiff, transferred to C. & M., stock brokers, the bonds in question, to be held as margins on his stock transactions. C. & M. deposited them with defendant, a national bank, as security for any indebtedness, present or future, by them to defendant, with authority to sell at public or private sale, without notice, and apply the proceeds in payment of such indebtedness, and on the faith of such deposit defendant promised to pay the checks of C. & M. to a specified amount; simultaneously therewith it certified checks to that amount and on the same day paid them to the holders thereof. Plaintiff claimed that the certification of the checks without an equivalent amount of money on deposit, being in violation of the National Banking Act (U. S. R. S. § 5208), no valid debt was created thereby, and so defendant did not become a *bona fide* holder of the bonds. *Held*, untenable; *first*, that the act fixes and limits the penalty for its violation, and instead of invalidating, expressly affirms the validity of the certification; *second*, that the provision had no application to the question, as the contract of the bank with C. & M. was simply to protect the checks of the firm,

i. e., to loan the amount specified and pay it out on its check, not to certify them; that this contract was lawful and its legality was not affected by the certification. *Thompson v. St. N. Nat. Bank*. 325

ADMISSIONS AND DECLARATIONS.

J., plaintiff's testator, loaned certain moneys to various parties, taking bonds and mortgages and a promissory note, all payable to defendant, all of which were in J.'s possession at the time of his death. In an action to recover possession of said securities, which plaintiffs alleged to have been the property of the testator, and to have been unlawfully taken by defendant from them, it appeared that J. had moneys in his hands belonging to defendant, who was his niece; that he stated to the borrowers and to others that the moneys loaned belonged to defendant; that at his request defendant had executed to him a power of attorney, among other things, "to govern and control all bonds and mortgages, to sell and transfer the same, * * * to take charge of all personal property * * * that he may now have in his possession." The only explanation on the part of plaintiffs was a declaration contained in a paper alleged to have been delivered by the testator to one of the plaintiffs prior to his death, wherein he expressed his wishes with reference to the disposition of these securities after his death, and stated that he had taken the mortgages in the name of his niece to avoid being taxed for the same. *Held*, that such declaration was incompetent to defeat the defendant's title; and that a finding of the trial court that plaintiffs were entitled to the securities was not justified by the evidence and was properly reversed by the General Term. *Lovely v. Erskine*. 52

ADVERSE POSSESSION.

1. In an action of ejectment these facts appeared: Pursuant to an

application on behalf of plaintiff an act was passed in 1839 (Chap. 246, Laws of 1839), authorizing it to acquire title by condemnation proceedings to land of which that in question is a part. Commissioners of estimate and assessment, purporting to have been appointed in proceedings under the act, made reports therein which were confirmed by the Supreme Court. The city paid the amounts awarded to the owners and immediately took possession of the lands. Pursuant to resolution of the common council a market was erected thereon. In 1842 that body, by resolution, directed a sale of all the other buildings on the land except the market-house. In 1843 a substantial fence was built by the city, inclosing all the land, and thereafter, for about twenty years, it leased the market-house. It also, in 1847 and 1849, erected engine-houses on the land. The land remained so inclosed and occupied until about 1860, when, pursuant to resolutions of the common council, the buildings were removed, and in 1863 it was thrown open to the public as a park, and was so used down to 1866 or 1867, during all of which time there was a substantial fence around it. In 1867 the land was put up for sale in lots at auction by the commissioners of the sinking fund. The purchasers of some of the lots took title and erected buildings thereon, other purchasers refused to take title and litigations resulted; the lots bid off by them, for five or six years thereafter, were neglected, the fences decayed and the lots were left open to intruders. Defendant and others went into possession of the premises in question in 1873 as mere intruders; he took several deeds from the others; the possession of none of them ante-dated 1873. In 1871 a committee of the commissioners of the sinking fund, charged with the duty of estimating the value of the real estate belonging to the city, included said premises in their report. This action was commenced in 1873. *Held*, that, without regard to the validity of the condemnation proceedings, as

against defendant the city's prior possession authorized a recovery; that there was no such abandonment by it as lost to it the benefit of such prior possession; also, that it had acquired title by adverse possession. *Mayor, etc., v. Carleton.* 284

2. A city, as well as an individual, may obtain title by adverse possession. *Id.*
3. In an action for a specific performance of a contract for the sale of land, title to which plaintiff claimed under an administrator's sale, the trial judge found, upon sufficient evidence, that plaintiff's testator had been in continual occupation and possession of the premises in question under a claim of title founded upon deeds from 1851; that the lands had been protected by a substantial enclosure; that plaintiffs and their testator had paid the taxes and assessments upon the same. After testator's death the plaintiffs had rented the premises. There was no proof or pretense of any other claim to the property lying either in grant or in claim. *Held*, that a valid grant must be presumed as arising from an exclusive and uninterrupted possession under a claim of title founded on a conveyance for more than twenty years; that such a presumption will always displace objections based on flaws in the proceedings in which the title has had its source and protect it from being injured by their disclosure. *O'Connor v. Higgins.* 511

APPEAL.

1. This appeal was from an order of the General Term, which reversed a judgment of the Special Term and granted a new trial. The respondent moved for a dismissal of the appeal on the ground that the order was not appealable. The appellant, in the notice of appeal, assented to the rendition of judgment absolute against him if the order was affirmed. *Held*, that this gave the court jurisdiction to entertain the appeal, and although judgment would have been more

- appropriately ordered under the decision of the General Term, in a case on the equity side of the court involving the construction of a will, as the awarding of a judgment absolute would work no prejudice, motion denied. *Henderson v. Henderson*. 1
2. Where, aside from a joint appeal, one of the parties appellant appealed separately from the same judgment, *held*, that the individual appeal should be dismissed as unnecessary. *Parker v. Linden*. 28
 3. Where, upon appeal in an action tried by the court, the General Term reverses the judgment and it appears by its order that the reversal was upon questions, both of law and fact, it will be deemed to have based its decision upon errors of fact, if that be necessary to sustain such decision. *Louvery v. Traskine* 53
 4. *It seems* that to justify a reversal upon the facts by the General Term, it must appear that the findings were against the weight of evidence, or that the proofs so clearly preponderated in favor of a contrary result that it can be said with a reasonable degree of certainty that the trial court erred in its conclusions. *Id.*
 5. Where, upon the trial of an issue of fact by a surrogate, the evidence on each side is so nearly balanced that a determination either way would not be reversed upon appeal, it may not be said that the losing party is not prejudiced by material testimony of an incompetent witness, given under objection and exception, and the admission of such testimony is error requiring a reversal. *In re Eysaman*. 62
 6. Where the Supreme Court has granted an application by a railroad corporation for the appointment of commissioners to appraise lands sought to be taken, and the power to take lands for the corporate purposes is found clearly to exist in the charter and general law, and the purpose stated is one within the contemplation of the legislative act, this court will not interfere with the conclusions of the Supreme Court as to the necessity for taking the land, if reached after due proceedings as prescribed; its review will be confined to those questions which relate to the validity and legality of the proceedings. *In re Un. El. R. R. Co* 275
 7. In an action by an executor to recover damages for the alleged conversion of certain promissory notes it was conceded that the notes, before the death of plaintiff's testatrix, belonged to her, and that thereafter defendant had possession of them. The issue was as to whether she gave them to him or whether he wrongfully became possessed thereof. Plaintiff, as a witness in his own behalf, testified that a few hours before the death of decedent, when she was in an unconscious state, which continued until her death, he saw the notes in her trunk; that just after her death he looked again and they were gone, and that defendant was in the house and had an opportunity to take them. Defendant, as a witness in his own behalf, was permitted to testify that he had possession of the notes a week before the death of deceased, and that they were in his possession when the executor testified he saw them in the trunk; he was then asked: "Did you take them (the notes) from any person without their consent?" This was objected to as incompetent, under the Code of Civil Procedure (§ 829), and was excluded. *Held*, that if the ruling was erroneous, as the testimony was only proper in rebuttal, not to establish an affirmative defense, and as defendant, if believed, had already thoroughly and perfectly rebutted plaintiff's evidence, the error did not justify a reversal. *Lewis v. Merrill*. 386
 8. While, where findings of fact by a court or referee are irremediably conflicting, this court will be governed by that finding which is most favorable to the appellant, it is the duty of the court to reconcile and give to each some office to perform, and it is only when this

- cannot, by a reasonable construction, be accomplished, that the rule has effect. *Green v. Roworth*. 462
9. The Special Term of the Superior Court of the city of New York has power to suspend, by order, the operation of a judgment rendered by it in an equity case, or to relieve the defendant from the duty of immediate obedience pending an appeal to this court, where the appeal does not of itself relieve, and a mere order staying proceedings on the part of plaintiff would not effect that purpose. *Genet v. Pres't, etc., D. & H. C. Co.* 472
10. Where no undertaking has been filed or served upon appeal to this court, the Supreme Court has no power to grant an order allowing the appellant to perfect his appeal by filing an undertaking. *Nelson v. Tenney*. 616
11. As to whether relief will be given to an attorney, having a lien upon a judgment for his costs, against a fraudulent satisfaction thereof by his client upon a summary application by motion, or he will be required to bring suit, is within the discretion of the Supreme Court, and its determination is not reviewable here. *Howitt v. Merrill*. 630
12. The provision of the Code of Criminal Procedure (§ 528, as amended by Chap. 493, Laws of 1887), authorizing this court, on appeal, in a criminal action "when the judgment is of death" to order a new trial if "satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below," does not authorize a review of findings of fact of a jury, founded on sufficient evidence, or a reversal simply because of a difference of opinion on the facts between the court and the jury; it simply invests the court with power to order a new trial where, upon a consideration of the whole case, it is manifest injustice has been done, although the question has not been properly raised by exceptions. *People v. Kelly*. 647
18. While the fact that the commissioners of the Board of Claims, under the act of 1883 (Chap. 205, Laws of 1883), are required to view premises claimed to have been damaged by the state, and to act to some extent upon their own judgment, does not deprive this court of the power to review their award upon the question of damages; yet, as they may and must base their award upon knowledge derived from that view as well as the evidence of witnesses, unless it appears that they adopted some erroneous rule of damages, or the evidence and their findings show that they have misconceived the facts, and erred in their estimate, their award will not be interfered with. *Perkins v. State*. 660
- When defense not set up in answer is proved without objection on trial, objection may not be raised on appeal.
See Fowler v. B. S. Bank. 450
- When, on motion to compel appellant to file a new undertaking, the court will not permit an undertaking for costs only.
See Beeman v. Banta. (Mem.) 615
- ### APPLICATION OF PAYMENTS.
- In the absence of express application of payments by the parties, the law applies them to the earliest items of the account. *Thompson v. St. N. Nat. Bank*. 325
- ### ASSESSMENT AND TAXATION.
1. The provision of the Revised Statutes (1 R. S. 888, § 4, sub. 7), exempting from taxation "the personal property of every incorporated company not made liable to taxation on its capital in the fourth title" of the chapter containing it, does not include an incorporated college or religious society. *Cullin v. Trustees, etc.* 133

2. *It seems* the words "incorporated company" were intended to designate only such business and stock corporations, as by the chapter are, under special circumstances, exempted from taxation on their capital, and do not embrace corporations for religious, literary or charitable purposes not having a capital. *Id.*
3. The acts of 1853 and 1857 (Chap. 654, Laws of 1853, and chap. 456, Laws of 1857), which repeal certain sections of said chapter, and so greatly restrict the operation of said provision, do not change the construction of the words "incorporated company," or extend their meaning so as to embrace other corporations than those to which they originally referred. *Id.*
4. A religious society, therefore, incorporated under the general act of 1813 (Chap. 60, Laws of 1813), providing for the incorporation of such societies, and a college not specially exempted from taxation by its charter or some special act, are included in the provision of the collateral inheritance tax act (Chap. 713, Laws of 1887), which subjects to the tax imposed by the act all property which shall pass by will to any "body, politic or corporate * * * other than to * * * the societies, corporations and institutions now exempted by law from taxation." *Id.*
5. The words "now exempted by law" in said provision refer to exemptions under the laws of this state, and the exemption of a foreign corporation under the laws of the jurisdiction of origin, does not withdraw it from the operation of said act. *Id.*
6. Accordingly *held*, that a college incorporated and located in another state was liable to taxation upon a legacy, given by the will of a resident of the state, although by its charter it is exempted from taxation. *Id.*
7. Property within this state, which passed by will or intestacy from a non-resident decedent to collateral relatives or strangers, was not taxable under the "Collateral Inheritance Act" (Chap. 483, Laws of 1885), prior to its amendment in 1887 (Chap. 713, Laws of 1887). That act only applied to property so passing "from any person who may die seized or possessed of the same while being a resident of the state" and to property within the state owned by a resident and transferred, *inter vivos*, to take effect at the death of the transferrer. (DANFORTH and FINCH, J.J., dissenting.) *In re Euston.* 174
8. The Y. M. C. Association of the city of New York, incorporated under the act of 1866 (Chap. 350, Laws of 1866), is not a seminary of learning within the meaning of the statutory provision exempting from taxation buildings erected for the use of, and used by such institutions. (1 R. S. 888, § 4, sub. 3, as amended by chap. 397, Laws of 1883.) *Y. M. C. A. v. Mayor, etc.* 187
9. Said association erected on lots owned by it on the Bowery a building, the basement of which contained a gymnasium, bowling alley and bath-room; above were twenty-two rooms, one of which only was devoted to purposes of public worship, and that was used also as a lecture hall. In an action to cancel a tax levied upon said premises, *held*, that they were not exempted from taxation under the general act (*supra*) exempting "every building for public worship" as the same is modified in its application to the city of New York by the "Consolidation Act" (§ 827, chap. 410, Laws of 1882), as it was not exclusively used for such purpose; and, in the absence of any special act exempting it, that the property was liable to taxation. *Id.*
10. Certain lands, of which G. died seized, descended to plaintiff as heir-at-law, subject to an estate for two lives in a trustee, created by the will of G. Taxes had been assessed upon the lands prior to the death of the testator. These were paid out of the proceeds of sales of the land pursuant to judgments in a foreclosure suit and in an ac-

tion for dower commenced after the death of G. Plaintiff and defendant, the executor and trustee under the will of G., were parties defendant to said actions. In an action to compel defendant to restore to the trust fund, out of the personal estate the amount of the taxes, it appeared that the personal estate amounted to more than the taxes, but that there were claims of unpreferred creditors of the decedent largely exceeding the personalty. *Held*, that, while it was the duty of the executor to pay the taxes before paying the unpreferred debts (2 R. S. 87, § 27), while the proceeds of the sale of the land, as between the heir-at-law and the next of kin or legatees were to be treated as realty, and while the executor, as such, was not vested with administrative authority to sell lands for the payment of debts, yet as, if the executor was required to pay over to himself, as trustee, out of the personalty the amount taken from the real estate to pay taxes, the fund would be liable to be reappropriated on the application of creditors to the payment of general debts, and as, without any action on the part of the executor, the taxes have been paid, the relief asked for was properly denied.

Smith v. Cornell. 820

11. No tax or assessment is a lien or incumbrance within the meaning of a covenant against them until the amount thereof is ascertained or determined. *Parker v. Downey.* 644

— *When taxes on real estate devised to and occupied by tenant for life, properly payable by executors out of general fund.*

See In re Albertson. 484

ATTORNEY.

As to whether relief will be given to an attorney, having a lien upon a judgment for his costs, against a fraudulent satisfaction thereof by his client upon a summary application by motion, or he will be required to bring suit, is within the

discretion of the Supreme Court, and its determination is not reviewable here. *Howitt v. Merrill.*

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BANKS AND BANKING.

Plaintiffs paid into defendant's bank \$500 upon its promise to remit that sum for them to H. at Leadville, Col., receiving a "letter of advice" signed by defendant's cashier, directed to a Leadville bank, which stated that the account of that bank was credited that day with \$500 "received from" plaintiffs "for the use of" H. Plaintiffs forwarded this letter to H., but before its receipt the Leadville bank had failed and a receiver had been appointed, who refused to pay the money. Plaintiffs, on return of the letter, demanded of defendant that it carry out its agreement or refund the money, and upon its refusal, brought this action to recover the same. *Held*, that defendant received the money as a special deposit and was bound to retain it until drawn out under authority of the letter; that by its contract it agreed, in substance, that the Leadville bank would pay the amount on presentation of the letter, and when payment was refused and the letter returned, it became at once liable to repay the money to plaintiffs; that the words in the letter that the Leadville bank's "account is credited" with the money were controlled in their general application by the remainder of the clause, *i. e.*, that it was "for the use of" H.; that no contractual relations existed between plaintiffs and the Leadville bank, and no obligation was imposed upon it until it adopted the defendant's act or in some manner assumed the obligation; that the fact that defendant was its correspondent and maintained an account with it did not affect the question. *Outler v. Am. Bk. Nat. Bank.* 593

See SAVINGS BANKS.

BANKRUPTCY.

1. Where, upon sale of real estate

by an assignee in bankruptcy, the notice and conditions of sale were attached together and signed by the parties, *held*, that they constituted a memorandum by which both were bound; and that prior negotiations and oral agreements were merged therein; also, that there was an implied warranty that the vendor had a good title, but that this warranty existed only so long as the contract remained executory, and as the terms of sale required a conveyance without warranty or personal covenant, but simply sufficient to pass whatever right the vendor had in the lands upon delivery of the deed, the covenant implied in the contract was discharged, and the grantor thereafter was only bound by whatever covenants there were in the deed. *Clark v. Post.* 17

2. The deed given by the assignee contained a recital of the various proceedings in bankruptcy which led to the appointment of the assignee; of the commencement of a suit by him as such assignee against S., wife of the bankrupt, who held the legal title of the real estate in question, to have such title adjudged invalid, and a conveyance of the premises to him in consideration of the discontinuance of such suit, "and other good and valid considerations." *Held*, that this did not make a warranty, either express or by way of covenant, that the recitals were true, or permit a recovery as for a breach on proof that the narration was false, as it was not material to the contract contained in the deed or an inducement to it. *Id.*

BILLS, NOTES, CHECKS.

As against a promissory note, payable on demand, with interest, the statute of limitations begins to run at its date. *Mills v. Davis.* 243

BOARD OF CLAIMS.

While the fact that the commission-
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ers of the Board of Claims, under the act of 1888 (Chap. 203, Laws of 1888), are required to view premises claimed to have been damaged by the state, and to act to some extent upon their own judgment, does not deprive this court of the power to review their award upon the question of damages; yet, as they may and must base their award upon knowledge derived from that view as well as the evidence of witnesses, unless it appears that they adopted some erroneous rule of damages, or the evidence and their findings show that they have misconceived the facts, and erred in their estimate, their award will not be interfered with. *Perkins v. State.* 660

BONDS.

1. T. purchased certain coupon bonds, payable to bearer, which were kept by him up to the time of his death, and he cut off and collected the coupons as they fell due, except those falling due during six months prior to his death. At the time of the purchase of the bonds T. stated that he wanted them for C. and afterwards he directed his banker, who made the purchase for him, to have them registered in her name. The banker took them to the office of the company which issued them and the name of C. was indorsed upon each bond with date of indorsement and name of the transfer agent. It did not appear that C. knew anything of the transaction. *Held*, that, as there was no delivery of the bonds, there was no completed gift. *In re Crawford.* 560

2. The bonds were issued by a foreign corporation, and made payable in New York or Philadelphia. *Held*, that the act of 1871 (Chap. 84, Laws of 1871), providing for the registry of railroad and other corporate mortgage bonds did not apply; that it applied only to bonds which have been or may be issued and are payable in this state; but that even if said act was applicable, the registry did not change

the legal title to the bonds while the original owner continued to hold them; that the title would not pass until a delivery of the bonds to the intended donee or to some one for her, although the general negotiability of the bonds might have been destroyed by the indorsement. *Id.*

CALENDAR.

1. An action against a railroad corporation to recover the amount of interest coupons upon bonds issued by another similar corporation, based upon an agreement between the two companies, by which defendant has become liable for their payment, is not an action "founded upon a note or other evidence of debt, for the absolute payment of money" within the meaning of the provision of the Code of Civil Procedure giving to such an action against a corporation a preference upon the calendar. (§ 791, sub. 8.) *Folhemus v. F. R. R. Co.* 617
2. Nor do the facts, upon which such an action is based, furnish a reason for giving it a preference, by the court, in the exercise of its discretion; plaintiff stands in no better position than ordinary litigants. *Id.*

CASES REVERSED, DISTINGUISHED, ETC.

- Henderson v. Henderson* (46 Hun, 509), reversed. *Henderson v. Henderson.* 1
- Clark v. Post* (45 Hun, 265), reversed. *Clark v. Post.* 17
- Peck v. Hensley* (20 Tex. 678), distinguished. *Clark v. Post.* 25
- Carry v. White* (59 N. Y. 336), distinguished and questioned. *In re Eysman.* 73
- Kutz v. McCune* (32 Wis. 638), disapproved. *Huyck v. Andrews.* 89
- Memmert v. McKeen* (112 Penn. 815), disapproved. *Huyck v. Andrews.* 89

In re G. E. R. Co. (70 N. Y. 361), distinguished. *Astor v. N. Y. Arcade R. Co.* 114

Springett v. Jennings (L. R., 6 Ch. App. 383), distinguished. *Riker v. Cornwall.* 126

Kerr v. Dougherty (79 N. Y. 327), distinguished. *Riker v. Cornwall.* 127

Phelan v. N. W. Mut. L. Ins. Co. (43 Hun, 419), reversed. *Phelan v. N. W. Mut. L. Ins. Co.* 147

Y. M. C. Ass'n v. Mayor, etc., N. Y. (44 Hun, 102), reversed. *Y. M. C. Ass'n v. Mayor, etc., N. Y.* 187

Travis v. Myers (67 N. Y. 543), distinguished. *Jackson v. Bunnell.* 220

Everson v. McMullen (45 Hun, 578), reversed. *Everson v. McMullen.* 293

Bartlett v. Musliner (28 Hun, 235), distinguished. *Everson v. McMullen.* 301

Runyan v. Stewart (12 Barb. 537), distinguished. *Everson v. McMullen.* 302

Wedge v. Moore (6 Cush. 8), distinguished. *Everson v. McMullen.* 302

Peters v. Delaplaine (49 N. Y. 362), distinguished. *Deen v. Milns.* 309

Smith v. Cornell (111 N. Y. 554), distinguished. *Smith v. Cornell.* 324

Shipman v. Rollins (98 N. Y. 311), distinguished. *Cruikshank v. Home for Friendless.* 352

Burrill v. Boardman (49 N. Y. 254), distinguished. *Cruikshank v. Home for Friendless.* 352

Bond v. Smith (44 Hun, 219), reversed. *Bond v. Smith.* 378

Lewis v. Merritt (42 Hun, 161), reversed. *Lewis v. Merritt.* 386

Grey v. Grey (47 N. Y. 552), distinguished and limited. *Lewis v. Merritt.* 380

<i>Hill v. Woolsey</i> (42 Hun, 481), reversed. <i>Hill v. Woolsey</i> .	391
<i>In re Brown</i> (98 N. Y. 295), distinguished. <i>In re Wells</i> .	403
<i>Shannon v. Portsmouth</i> (54 N. H. 183), disapproved. <i>Gregory v. Mayor, etc.</i>	418
<i>Pratt v. Eaton</i> (18 Hun, 298), distinguished. <i>Mayor, etc. v. Sonneborn</i> .	426
<i>Fowler v. Bowery Sav. Bk.</i> (47 Hun, 399), reversed. <i>Fowler v. Bowery Sav. Bk.</i>	450
<i>Brush v. Jay</i> (50 Hun, 446), reversed in part. <i>Brush v. Jay</i> .	482
<i>Wood v. Hunt</i> (38 Barb. 802), distinguished. <i>Loos v. Wilkinson</i> .	492
<i>Thompson v. Bickford</i> (19 Minn. 17), distinguished. <i>Loos v. Wilkinson</i> .	498
<i>Allen v. Berry</i> (50 Mo. 90), distinguished. <i>Loos v. Wilkinson</i> .	498
<i>Strake's Case</i> (1 Bland. Ch. 57), disapproved. <i>Loos v. Wilkinson</i> .	494
<i>Harcey v. McDonnell</i> (48 Hun, 409), reversed. <i>Harcey v. McDonnell</i> .	520
<i>Lichtenberger v. Herdtfelder</i> (108 N. Y. 302), distinguished. <i>Harcey v. McDonnell</i> .	531
<i>Cohen v. Mayor, etc.</i> (43 Hun, 345), reversed. <i>Cohen v. Mayor, etc.</i>	532
<i>Buckley v. G. P. & R. Mfg. Co.</i> (41 Hun, 450), reversed. <i>Buckley v. G. P. & R. Mfg. Co.</i>	540
<i>Martin v. Funk</i> (75 N. Y. 134), distinguished. <i>In re Crawford</i> .	560
<i>In re Vowers</i> (45 Hun, 418), reversed. <i>In re Vowers</i> .	569

CAUSE OF ACTION.

1. Money in the hands of one person, to which another is equitably entitled, may be recovered by the

latter in a common-law action for money had and received, subject to the restriction that the mode of trial and the relief which can be given in a legal action is adapted to the exigencies of the case and is capable of adjustment in such an action without prejudice to the interests of other parties. *Roberts v. Ely*. 123

2. No privity of contract is required to sustain such an action, except that which results from the circumstances, and it is immaterial whether defendant's original possession was rightful or wrongful. *Id.*

3. Where a stipulation between the parties to discontinue an action in the Marine Court of the city of New York and that a judgment therein shall be discharged and vacated of record had been lost, held, that the judgment-debtor could maintain an action to establish and compel the specific performance of the contract; that, assuming such debtor had a remedy by motion in the Marine Court, as to which *quære*, this was no defense to the action. *Deen v. Milne*. 803

4. The law will not interfere at the instance of either party to relieve him from an illegal contract, so far as it has been executed. *Talinger v. Mandeville*. 427

5. Where administrators, upon application of a creditor of their intestate, refuse to exercise the power conferred upon them by the act of 1858 (§ 1, chap. 314, Laws of 1858), to disaffirm a transfer made by said intestate to one of the administrators in fraud of the rights of creditors and to reclaim the property fraudulently conveyed, and where the estate in the hands of the administrators proves insufficient to pay the debts, the creditor may bring an action for his own benefit and that of the other creditors to reclaim the property, making all the administrators parties. *Harcey v. McDonnell*. 526

6. There is always reasonable ground for apprehending accidents from

the transportation of passengers in said tubes," is violative of said constitutional provision, as it authorizes the construction of underground railways by the corporation organized under the original act, with authority, upon obtaining the requisite consents, to propel its cars by steam or any other motive power, and thus to transform itself into a railroad corporation. *Id.*

7. To comply with said constitutional requirement the title must be such at least as to fairly suggest or give a clue to the subject dealt with in the act. *Id.*

8. The said act of 1873 being thus unconstitutional and void, all subsequent legislation based upon it, *i. e.*, the acts of 1874, 1881 and 1886 (Chap. 503, Laws of 1874; chap. 454, Laws of 1881; chap. 312, Laws of 1886), fall with it. *Id.*

9. The said act of 1886 is also violative of the constitutional provision (art. 3, § 18), forbidding the passage of a private or local bill granting to any corporation "the right to lay down railroad tracks," except upon the conditions specified, or granting to a private corporation "any exclusive privilege, immunity or franchise whatever." *Id.*

10. The Y. M. C. Association of the city of New York, incorporated under the act of 1866 (Chap. 350, Laws of 1866), is not a seminary of learning within the meaning of the statutory provision exempting from taxation buildings erected for the use of, and used by such institutions. (1 R. S. 388, § 4, subd. 3, as amended by chap. 397, Laws of 1883.) *Y. M. C. A. v. Mayor, etc.* 187

11. Said association erected on lots owned by it on the Bowery a building, the basement of which contained a gymnasium, bowling alley and bath-room; above were twenty-two rooms, one of which only was devoted to purposes of public worship, and that was used also as a lecture hall. In an action to cancel a tax levied upon said premises, *held*, that they were not exempted from taxation under the general act

(*supra*) exempting "every building for public worship" as the same is modified in its application to the city of New York by the "Consolidation Act" (§ 827, chap. 410, Laws of 1882), as it was not exclusively used for such purpose; and, in the absence of any special act exempting it, that the property was liable to taxation. *Id.*

See COLLEGES.

MANUFACTURING COMPANIES.
MUNICIPAL CORPORATIONS.
RAILROAD COMPANIES.
RELIGIOUS CORPORATIONS.

COURTS.

See GENERAL TERM.

SUPERIOR COURT (N. Y. CITY).
SUPREME COURT.
SURROGATES' COURTS.

COVENANTS.

1. The existence of an easement authorizing another to dam up and use the waters of a stream upon lands conveyed, is a breach of a covenant against incumbrances, and knowledge on the part of the grantee at the time of the conveyance or notice to him of the existence of the easement is no defense to an action for the breach. *Huyck v. Andrews* 81

2. *It seems* that any easement, except that of a public highway, is a breach of such a covenant; it protects the grantee against every other adverse right, interest or dominion over the land, and he may rely upon it for his security. *Id.*

3. There is no distinction in this respect between incumbrances which affect the title and those simply affecting the physical condition of the land. *Id.*

4. In an action to recover damages for the breach of such a covenant, it appeared that B. owned an easement in a stream upon the land conveyed, *i. e.*, the right to erect and

maintain a dam across it and to use all of its waters and to extend the dam then existing. At the time of the conveyance there was a dam across the stream which had been maintained for many years, and the waters were used to furnish power to a mill upon B.'s adjoining land. *Held*, that the grantee, although knowing of the existence of the mill and dam, was not charged with knowledge that B had a paramount right to the exclusive use of the waters or a right to extend his dam. *Id.*

5. Defendant alleged in his answer a mistake and asked to have the deed reformed by making the conveyance subject to B.'s easement. *Held*, that evidence of the value of the dam in connection with the mill was incompetent, either upon this issue or the question of damages; that the proper measure of damages was the difference between the value of the land without and with the easement. *Id.*

6. No tax or assessment is a lien or incumbrance within the meaning of a covenant against them until the amount thereof is ascertained or determined. *Harper v. Downey.* 644

7. Where, therefore, prior to the execution and delivery of a deed of premises in the city of New York containing such a covenant, the work of paving a street had been completed by the city pursuant to an ordinance of the common council duly passed and the expense of the work paid by the city, but the apportionment of the amount upon the persons and property benefited was not made until thereafter, when a proportion thereof was assessed upon the premises conveyed and was paid by the grantee. *Held*, that an action upon the covenant to recover the amount so paid was not maintainable. *Id.*

CREDITOR'S SUIT.

1. Where administrators, upon application of a creditor of their in-

testate, refuse to exercise the power conferred upon them by the act of 1858 (§ 1, chap. 814, Laws of 1858), to disaffirm a transfer made by said intestate to one of the administrators in fraud of the rights of creditors and to reclaim the property fraudulently conveyed, and where the estate in the hands of the administrators proves insufficient to pay the debts, the creditor may bring an action for his own benefit and that of the other creditors to reclaim the property, making all the administrators parties. *Harvey v. McDonnell.* 526

2. It is not essential that the plaintiff in such an action should be a judgment-creditor; he stands simply as trustee in place of the administrators. *Id.*

3. The will of S., after providing for the payment of debts, etc., gave all her property to her executors, in trust, to apply the income therefrom to the education and maintenance of her only son until he should arrive at the age of twenty-five years, the property and accumulations to be then divided equally between her son and husband, with cross-remainders in case of the death of either prior to the time of division. She directed that after her death some legitimate business should be carried on by her executors for the benefit of her son, of which her husband should be retained as manager at a yearly salary. Then followed this provision: "I do hereby authorize and empower my executors to sell or make such other disposition of my real and personal estate as the safe conduct of such business shall seem to them to require." The testatrix at the time of her death was engaged in the merchant tailoring business, which was carried on by defendant, her husband; he was one of the executors and alone qualified, and continued the business after the death of his wife. Plaintiffs sold and delivered to defendant, as executor, certain goods for the purposes of said business. In an action to compel defendant to pay the purchase-price of the goods out of the

assets of the estate in his hands the complaint set forth the foregoing facts, and alleged that, individually, he was irresponsible. *Held*, that plaintiffs were entitled to the relief sought; that the provisions of the will indicated unmistakably an intention on the part of the testatrix to subject her general assets to the debts of the business and to authorize her executors to contract debts therein binding her general estate. *Willis v. Sharp*. 586

CRIMINAL TRIAL.

1. After a witness for the prosecution, on the trial of an indictment for murder, who had witnessed the homicide, had testified to the circumstances attending it, and had shown in his testimony a disposition to favor the prisoner, the district attorney, with the avowed purpose of refreshing his recollection, asked him if he had not previously testified to certain other facts specified. The witness admitted that he had so testified, and upon being asked if it was true, answered that it was. *Held*, that the method pursued to refresh the witness' recollection was proper. *People v. Kelly*. 647

2. It is not sufficient to excuse a person from the consequences of a fatal assault upon another, that he was provoked thereto by an angry controversy of words alone, however aggravating, and when the parties are unequal in strength, and the assaulting party being the stronger, and having no reason to apprehend physical injury from the other, uses a dangerous weapon, the question whether it was used with homicidal intent is one of fact for the jury. *Id.*

DEBTOR AND CREDITOR.

In an action for an accounting as to moneys alleged to have been placed in the hands of S., defendant's testator, by plaintiff for investment, the only evidence presented was a

letter from S, to plaintiff, which, after acknowledging the receipt of the money and that it was drawing interest at seven per cent, continued as follows: "If I can find an opportunity of purchasing a mortgage * * * whereby I can, without risk, secure a greater profit, I shall do so unless you wish to make any other use of the money; should you desire to use it, please let me know." *Held*, that the relation of plaintiff to the decedent was that of a creditor upon a simple contract, not that of a beneficiary under a trust; that the amount was payable at once and the statute of limitations then began to run, and after the lapse of six years was a bar to the action. *Budd v. Walker*. 637

See CREDITOR'S SUIT.

DEED.

1. A deed given by an assignee in bankruptcy contained a recital of the various proceedings in bankruptcy which led to the appointment of the assignee; of the commencement of a suit by him as such assignee against S., wife of the bankrupt, who held the legal title of the real estate in question, to have such title adjudged invalid, and a conveyance of the premises to him in consideration of the discontinuance of such suit, "and other good and valid considerations." *Held*, that this did not make a warranty, either express or by way of covenant, that the recitals were true, or permit a recovery as for a breach on proof that the narration was false, as it was not material to the contract contained in the deed or an inducement to it. *Clark v. Post*. 17
2. The existence of an easement authorizing another to dam up and use the waters of a stream upon lands conveyed, is a breach of a covenant against incumbrances, and knowledge on the part of the grantee at the time of the conveyance or notice to him of the existence of the easement is no defense to an action for the breach. *Huyck v. Andrews*. 81

3. In an action to recover damages for the breach of such a covenant, it appeared that B. owned an easement in a stream upon the land conveyed, *i. e.*, the right to erect and maintain a dam across it and to use all of its waters and to extend the dam then existing. At the time of the conveyance there was a dam across the stream which had been maintained for many years, and the waters were used to furnish power to a mill upon B.'s adjoining land. *Held*, that the grantee, although knowing of the existence of the mill and dam, was not charged with knowledge that B. had a paramount right to the exclusive use of the waters or a right to extend his dam. *Id.*

4. Where, prior to the execution and delivery of a deed of premises in the city of New York, containing a covenant against liens or incumbrances, the work of paving a street had been completed by the city pursuant to an ordinance of the common council duly passed and the expense of the work paid by the city, but the apportionment of the amount upon the persons and property benefited was not made until thereafter, when a proportion thereof was assessed upon the premises conveyed and was paid by the grantee. *Held*, that an action upon the covenant to recover the amount so paid was not maintainable, as the assessment was not a lien at the time of the delivery of the deed. *Harper v. Dowdney.* 644

— *When deed executed by executors, who have power to sell for certain purposes under the will, is invalid because not in execution of the power.*

See Scholle v. Scholle. 261

DEFENSES.

1. So long as the purchaser of lands remains in possession under his deed he has no defense to an action for the purchase-price. His remedy in case of failure or defect in title is by action on the covenants in his deed or contract. *Kirtz v. Peck.* 222

2. J. deposited a sum of money with defendant in trust for E., his wife, plaintiff's testatrix. A pass-book was delivered to him. After the death of both husband and wife and the issuing of letters testamentary to plaintiff, he called with them at defendant's bank and demanded payment of the deposit; he was told by one of its officers that it would be paid to him when he came with the pass-book which was then in possession of the executor of J.; thereafter the latter presented the pass-book, together with proof of his appointment, and thereupon defendant paid the deposit to him on surrender of the pass-book. In an action to recover the sum deposited it appeared that plaintiff, after learning of the payment, brought suit against J.'s executor to recover the money so paid and recovered judgment therein, and being unable to collect the same, brought this action. *Held* (RUGER, Ch. J., dissenting), that plaintiff had an election of remedies, *i. e.*, either an action against defendant to recover the deposit, or an action against J.'s executor for money had and received; but he was not entitled to both, and by electing the latter remedy he lost the former, as by so doing he adopted and ratified the action of defendant in making the payment, and this would be a good defense in an action by defendant against J.'s executor to recover back the money paid to him. *Fowler v. Bowery Sav. Bk.* 450

3. The defense that the payment by the bank had been adopted and ratified by plaintiff was not set up in the answer. This objection was not raised upon the trial, and all the facts pertaining to such defense were proved without objection and were found by the court. *Held*, that the objection was not available here. *Id.*

DEFINITIONS.

The Y. M. C. Association of the city of New York, incorporated under the act of 1866 (Chap. 850, Laws

of 1866), is not a seminary of learning within the meaning of the statutory provision exempting from taxation buildings erected for the use of and used by such institutions. (1 R. S. 388, § 4, sub. 3, as amended by chap. 397, Laws of 1883.) *Y. M. C. A. v. Mayor, etc.* 187

DEVISE.

1. The common-law rule that lapsed devises do not fall into the residue, but go to the heirs as undisposed of by the will, was done away with by the Revised Statutes (2 R. S. 57, § 5), and there is now no difference between lapsed devises and lapsed legacies, as it respects the operation upon them of a general residuary clause. *Cruikshank v. Home for Friendless.* 338
2. The rule of the common law that a legacy or devise, given with or without words of limitation, lapses in case of the death of the devisee or legatee before the testator, in the absence of express words to prevent a lapse, or of something in the context of the will indicating a contrary intent, is still in force in this state, save so far as modified by the Revised Statutes (2 R. S. 66, § 52), i. e., where the devise or bequest is to a child or descendant of the testator. *In re Wells.* 396

See WILLS.

DISCONTINUANCE.

It seems an agreement to discontinue an action includes, as a necessary consequence the vacation of an judgment, either interlocutory or final, entered therein. *Deen v. Milne.* 303

DOWER.

1. Where there is a manifest incompatibility between the provision for a widow in a will and dower, the widow is put to an election between them. *Asche v. Asche.* 232

2. Where the purchaser of the equity of redemption in mortgaged premises, who is under no personal liability to pay the mortgage debt, pays it in aid of his own title, or procures its discharge by giving his own mortgage upon the premises in lieu thereof, as against the widow of his grantor who joined with her husband in the mortgage, but not in the deed, said grantee is entitled to the protection of the mortgagee's right as against the dower which is covered and charged by the mortgage. The purchaser takes his land charged as surety for the mortgage debt, and having paid it, has the right, as against the mortgagors, to be subrogated to the position of the mortgagee and to stand in equity as the purchaser and holder of his security, and the widow seeking to enforce in equity her right of dower, is bound to allow her due proportion of the mortgage debt. *Everson v. McMullen.* 293

EASEMENT.

1. The existence of an easement authorizing another to dam up and use the waters of a stream upon lands conveyed, is a breach of a covenant against incumbrances, and knowledge on the part of the grantee at the time of the conveyance or notice to him of the existence of the easement is no defense to an action for the breach. *Huyck v. Andrews.* 81
2. *It seems* that any easement, except that of a public highway, is a breach of such a covenant; it protects the grantee against every other adverse right, interest or dominion over the land, and he may rely upon it for his security. *Id.*
3. There is no distinction in this respect between incumbrances which affect the title and those simply affecting the physical condition of the land. *Id.*
4. In an action to recover damages for the breach of such a covenant, it appeared that B. owned an ease-

ment in a stream upon the land conveyed, *i. e.*, the right to erect and maintain a dam across it and to use all of its waters and to extend the dam then existing. At the time of the conveyance there was a dam across the stream which had been maintained for many years, and the waters were used to furnish power to a mill upon B.'s adjoining land. *Held*, that the grantee, although knowing of the existence of the mill and dam, was not charged with knowledge that B. had a paramount right to the exclusive use of the waters or a right to extend his dam. *Id.*

5. Defendant alleged in his answer a mistake and asked to have the deed reformed by making the conveyance subject to B.'s easement. *Held*, that evidence of the value of the dam in connection with the mill was incompetent, either upon this issue or the question of damages; that the proper measure of damages was the difference between the value of the land without and with the easement. *Id.*

EJECTMENT.

In an action of ejectment these facts appeared: Pursuant to an application on behalf of plaintiff an act was passed in 1839 (Chap. 246, Laws of 1839), authorizing it to acquire title by condemnation proceedings to land of which that in question is a part. Commissioners of estimate and assessment, purporting to have been appointed in proceedings under the act, made reports therein which were confirmed by the Supreme Court. The city paid the amounts awarded to the owners and immediately took possession of the lands. Pursuant to resolution of the common council a market was erected thereon. In 1842 that body, by resolution, directed a sale of all the other buildings on the land except the market-house. In 1843 a substantial fence was built by the city, inclosing all the land, and thereafter, for about twenty years, it leased the market-house. It also, in 1847 and 1849, erected engine-

houses on the land. The land remained so inclosed and occupied until about 1860, when, pursuant to resolutions of the common council, the buildings were removed, and in 1868 it was thrown open to the public as a park, and was so used down to 1866 or 1867, during all of which time there was a substantial fence around it. In 1867 the land was put up for sale in lots at auction by the commissioners of the sinking fund. The purchasers of some of the lots took title and erected buildings thereon, other purchasers refused to take title and litigations resulted; the lots bid off by them, for five or six years thereafter, were neglected, the fences decayed and the lots were left open to intruders. Defendant and others went into possession of the premises in question in 1878 as mere intruders; he took several deeds from the others; the possession of none of them antedated 1878. In 1871 a committee of the commissioners of the sinking fund, charged with the duty of estimating the value of the real estate belonging to the city, included said premises in their report. This action was commenced in 1878. *Held*, that, without regard to the validity of the condemnation proceedings, as against defendant the city's prior possession authorized a recovery; that there was no such abandonment by it as lost to it the benefit of such prior possession; also, that it had acquired title by adverse possession. *Mayor, etc. v. Carleton.*

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ELECTION OF REMEDIES.

1. J. deposited a sum of money with defendant in trust for E., his wife, plaintiff's testatrix. A pass-book was delivered to him. After the death of both husband and wife and the issuing of letters testamentary to plaintiff, he called with them at defendant's bank and demanded payment of the deposit; he was told by one of its officers that it would be paid to him when he came with the pass-book which was then in possession of the executor of J.; thereafter the latter presented the pass-book, together

with proof of his appointment, and thereupon defendant paid the deposit to him on surrender of the pass-book. In an action to recover the sum deposited it appeared that plaintiff, after learning of the payment, brought suit against J.'s executor to recover the money so paid and recover judgment therein, and being unable to collect the same, brought this action. *Held*, (RUGER, Ch. J., dissenting), that plaintiff had an election of remedies, *i. e.*, either an action against defendant to recover the deposit, or an action against J.'s executor for money had and received; but he was not entitled to both, and by electing the latter remedy he lost the former, as by so doing he adopted and ratified the action of defendant in making the payment, and this would be a good defense in an action by defendant against J.'s executor to recover back the money paid to him. *Fuller v. Bovey Savings Bank.* 450

2. *It seems* that if the money had been left on special deposit, plaintiff could have pursued it in the hands of said executor without losing his remedy against defendant. *Id.*
3. Where a trustee is bound to pay money to a beneficiary as a debt, if he makes payment to another person, this is not a payment of the debt and the moneys paid are not the property of the beneficiary. *Id.*
4. In such case the beneficiary may ignore the payment and sue the trustee as his debtor, or he may ratify and adopt the payment and sue the person who received the money, but he cannot do both, and his election, once effectually made, is conclusive upon him. *Id.*

EMINENT DOMAIN.

1. Where a railroad corporation organized under the "Rapid Transit Act" (Chap. 606, Laws of 1875), is authorized by its charter to construct distinct lines of railway "with the usual and necessary * * * curves, switches," etc.,

on two streets intersecting each other, it is within the scope of the powers conferred upon the company by the act and its charter to acquire title to, and it may take, by proceedings *in invitum*, lands necessary to effect a junction between the two routes, so as to enable the trains upon one to run upon the other. *In re Un. El. R. R. Co.* 275

2. The provision of said act (§ 26), which permits the junction of two railroads, comprehends the power to take real estate necessary to effect the connection, and it is not material that the two roads are operated by the same corporation. *Id.*
3. While, unless the proposed taking of lands by the law of eminent domain is justified by a purpose or end, permitted or clearly contemplated by the franchise conferred upon a railroad corporation by its charter or the general law, the courts should refuse their aid, the powers of the corporation must be deemed to extend to the accomplishment of legitimate corporate acts, and to whatever may be within the scope of the legislative grant. *Id.*
4. It is for the Supreme Court to investigate the facts upon which the corporation claims the right to take private property against the owner's will, and thereupon to decide whether a sufficient ground exists. *Id.*
5. *It seems*, if the corporate charter authorizes the proposed taking and the action of the corporation appears to be free from any imputation of unworthy or dishonest motives, the court may not interfere with the exercise of the power; the only limit to its exercise is the reasonable necessity of the corporation in the discharge of its duty to the public. *Id.*
6. Where the Supreme Court has granted such an application, and the power to take lands for the corporate purposes is found clearly to exist in the charter and general law, and the purpose stated is one

within the contemplation of the legislative act, this court will not interfere with the conclusions of the Supreme Court as to the necessity for taking the land, if reached after due proceedings as prescribed; its review will be confined to those questions which relate to the validity and legality of the proceedings. *Id.*

EQUITABLE CONVERSION.

1. L. died leaving a widow and no children. His will, after a devise of his residuary real estate to three persons named, his next of kin and heirs, who were non-resident aliens, contained a direction that said real estate be sold at auction by a referee appointed by the Supreme Court, the net proceeds to be deposited in court "in the same manner as money belonging to non-residents" for the use and benefit of the devisees "subject to the further order of the court." In an action for a construction of the will, it appeared that two of the devisees died before the testator; the court found that the gifts to them lapsed, and as to their portions the testator died intestate. The court also found that the direction for a sale worked an equitable conversion of the real estate into personality and the portion so undisposed of was to be distributed as such; that is, to the widow one-half and \$2,000 in addition. *Held*, error; that the direction for a conversion was simply for the purposes of the will, and while as to the non-resident aliens the doctrine of conversion would, if necessary, apply in their favor, if not required for that purpose, a conversion would not be presumed; and, so far as the widow was concerned, the property undisposed of, whether a sale was necessary or not, devolved according to its original character. *Parker v. Linden.* 28
2. The necessity of a conversion of realty into personality, to accomplish the purposes expressed in a will, is equivalent to an imperative direction to convert, and effects an equitable conversion. *Asche v. Asche.* 282
3. Where only a power of sale is given to executors by a will, without explicit and imperative direction for its exercise, and the intention of the testator can be carried out although no conversion is adjudged, the land will pass as such and not be changed into personality. In the absence of an express direction to sell one may not be implied unless the design and purpose of the testator is unequivocal and the implication so strong as to leave no substantial doubt; and so, unless the exercise of the power is rendered necessary and essential by the scope of the will, the authority is simply discretionary and does not work a conversion. *Scholle v. Scholle.* 261
4. The will of D., and a codicil thereto, gave his residuary estate to his executors in trust, to apply it, or the proceeds of sale, which they were empowered to make, to the establishment and endowment of a charitable institution, whose object and the class of persons to be relieved and benefited thereby should be the same as a charitable institution named. The executors were authorized and directed to apply for and obtain from the state legislature, "as early as practicable," an act of incorporation of such an institution, and to do this, if possible, within ten years after his decease. In the event that the gift "should be adjudged or proved invalid or its execution be impossible, either by judicial decision or from any other cause," the testator directed that all his residuary estate should be sold and the proceeds equally divided among certain existing religious and charitable corporations named, all of whom had capacity to take. In an action for the construction of the will, *held*, that the primary gift was invalid, as there was contemplated a period measured by years, not by lives, during which there would be no person in existence by whom an absolute estate in possession could be conveyed, and so there was an unlawful

obstructions in a public highway, and any person who wrongfully places them there or aids in so doing, is responsible for accidents occurring by reason of their presence. *Cohen v. Mayor, etc.* 532

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

1. In an action to recover possession of certain railroad bonds which the company alleged were the property of plaintiff and of which defendant had become wrongfully and illegally possessed, these facts appeared: T., the original plaintiff, transferred to C. & M., stock brokers, the bonds in question, to be held as margins on his stock transactions. C. & M. deposited them with defendant, a national bank, as security for any indebtedness, present or future, by them to defendant, with authority to sell at public or private sale, without notice, and apply the proceeds in payment of such indebtedness, and on the faith of such deposit defendant promised to pay the checks of C. & M. to a specified amount; simultaneously therewith it certified checks to that amount and on the same day paid them to the holders thereof. On the next business day C. & M. failed, owing defendant a balance of account. Thereafter T. served written notice upon defendant to the effect that the bonds were his property, forbidding its parting with the same except by his order, and demanding an account showing what lien plaintiff claimed to have thereon; this defendant did not furnish. No offer to pay such balance or request to redeem the bonds, or admission of any rights of defendant therein was made by T. Defendant subsequently sold the bonds, realizing less than the balance unpaid. *Held*, that a verdict was properly directed for defendant; that plaintiffs, to maintain the action, were bound to show that no title passed to defendant by the transfer to it, or that at some time prior to the commencement of the action they had become entitled to the possession;

that the bank acquired a valid title, and plaintiffs failed to show a right of possession, as they could only establish such a right by proof that the debt for which the bonds were pledged had been wholly paid, or that tender had been made of a sufficient sum to discharge it. *Thompson v. St. N. Nat. Bank.* 825

2. Plaintiff claimed that the certification of the checks without an equivalent amount of money on deposit, being in violation of the National Banking Act (U. S. R. S. § 5208), no valid debt was created thereby, and so defendant did not become a *bona fide* holder of the bonds. *Held*, untenable; *first*, that the act fixes and limits the penalty for its violation, and instead of invalidating, expressly affirms the validity of the certification; *second*, that the provision had no application to the question, as the contract of the bank with C. & M. was simply to protect the checks of the firm, *i. e.*, to loan the amount specified and pay it out on its check, not to certify them; that this contract was lawful and its legality was not affected by the certification. *Id.*

3. Also, *held*, the application by defendant of deposits made by C. & M. on the day the agreement was made to the payment of the prior indebtedness of the firm, instead of to the indebtedness created by the payment of the certified checks, was proper. *Id.*

CODE OF CIVIL PROCEDURE.

§ 14, subd. 4.	<i>King v. Barnes.</i>	476
§ 395.	<i>Mills v. Davis.</i>	243
§ 534.	<i>Cohu v. Husson.</i>	662
§ 602.	<i>Jackson v. Bunnell.</i>	216
§ 791, subd. 8.	<i>Polhemus v. Fitchburgh R. R. Co.</i>	617
	<i>In re Eysaman.</i>	62
	<i>Adams v. Morrison.</i>	152
§ 829.	<i>Wallace v. Straus.</i>	233
	<i>Mills v. Davis.</i>	243
	<i>Hill v. Woolsey.</i>	391
	<i>Nay v. Curley.</i>	575
§ 1023.	<i>Maicas v. Leony.</i>	619
§ 2285.	<i>King v. Barnes.</i>	476

2544. <i>In re Eysaman.</i>	62
2624. <i>In re Vouters.</i>	569
2742. <i>Van Rensselaer v. Van Rensselaer.</i>	207

CODE OF CRIMINAL PROCEDURE.

§ 528. <i>People v. Kelly.</i>	647
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CODE OF PROCEDURE.

§ 91. <i>Roberts v. Ely.</i>	128
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COLLEGES.

1. The provision of the Revised Statutes (1 R. S., 888, § 4, sub. 7), exempting from taxation "the personal property of every incorporated company not made liable to taxation on its capital in the fourth title" of the chapter containing it, does not include an incorporated college or religious society. *Catlin v. Trustees, etc.*, 138
2. A religious society, therefore, incorporated under the general act of 1813 (Chap. 60, Laws of 1813), providing for the incorporation of such societies, and a college not specially exempted from taxation by its charter or some special act, are included in the provision of the collateral inheritance tax act (Chap. 713, Laws of 1887), which subjects to the tax imposed by the act all property which shall pass by will to any "body, politic or corporate * * * other than to * * * the societies, corporations and institutions now exempted by law from taxation." *Id.*
3. The words "now exempted by law" in said provision refer to exemptions under the laws of this state, and the exemption of a foreign corporation under the laws of the jurisdiction of origin, does not withdraw it from the operation of said act. *Id.*

4. Accordingly held, that a college incorporated and located in another state was liable to taxation upon a legacy, given by the will of a resident of the state, although by its charter it is exempted from taxation. *Id.*

CONDITIONS.

In an action upon a promissory note for \$1,500, it appeared that the note was given as the consideration for a contract, whereby the payee, among other things, agreed that when the maker "shall pay" the \$1,500 she "shall release and discharge" him from all claims, etc. Held, the execution of the release was not a condition precedent to payment, nor was defendant entitled to a concurrent performance, but the payment was to precede the release; also, that, upon payment, the contract itself would operate as a release. *Kirtz v. Peck*, 222.

CONSTITUTIONAL LAW.

1. The act of 1868 (Chap. 842, Laws of 1868), entitled "An act to provide for the transmission of letters, packages and merchandise in the cities of New York and Brooklyn * * * by means of pneumatic tubes to be constructed beneath the surface," etc., is not violative of the provision of the state Constitution (art. 3, § 16), prohibiting the passage of any local or private bill embracing more than one subject, and requiring that to be expressed in the title. *Astor v. N. Y. Arcade R. Co.* 98
2. The act of 1873 (Chap. 185, Laws of 1873), declared in its title to be "supplemental to and amendatory of" said act of 1868, the title to which is quoted, with the addition of the words "and to provide for the transportation of passengers in said tubes" is violative of said constitutional provision, as it authorizes the construction of underground railways by the corporation organized under the

- original act, with authority, upon obtaining the requisite consents, to propel its cars by steam or any other motive power, and thus to transform itself into a railroad corporation. *Id.*
3. To comply with said constitutional requirement the title must be such at least as to fairly suggest or give a clue to the subject dealt with in the act. *Id.*
4. The said act of 1873 being thus unconstitutional and void, all subsequent legislation based upon it, *i. e.*, the acts of 1874, 1881 and 1886 (Chap. 508, Laws of 1874; chap. 454, Laws of 1881; chap. 812, Laws of 1886), fall with it. *Id.*
5. The said act of 1886 is also violative of the constitutional provision (art. 8, § 18), forbidding the passage of a private or local bill granting to any corporation "the right to lay down railroad tracks," except upon the conditions specified, or granting to a private corporation "any exclusive privilege, immunity or franchise whatever." *Id.*
6. These prohibitions may not be evaded under the pretense of an amendment of the charter of a corporation organized before the adoption of said constitutional provision, or a regulation of the exercise of powers and franchises possessed by it. *Id.*
7. The act of 1873 (Chap. 647, Laws of 1873), requiring the B. S. & F. R. R. Co., a street railroad corporation organized under the General Railroad Act (Chap. 140, Laws of 1850), to pay into the treasury of the city of New York one per cent of the gross receipts instead of a license fee as before prescribed (Chap. 190, Laws of 1878), is constitutional; it must be deemed an alteration and amendment of the charter of the company, and so is within the power reserved to the legislature by the general act, the provisions of the Revised Statutes to which corporations organized under said act are by its terms made subject and the state Constitution. (Art. 8, § 1.) *Mayor, etc., v. Twenty-third St. R. R. Co.* 811
8. While under the power so reserved the legislature cannot deprive a corporation of its property or annul its contracts with third persons, it may take away its franchise to be a corporation, or prescribe the conditions and terms upon which it may live and exercise such franchise. *Id.*

CONSTRUCTION.

1. If the principal disposition of a will can be upheld, ulterior, contingent limitations, which threaten violation of statutory rules respecting the ownership of property, if separable from the principal dispositions, may and should be disregarded. *Henderson v. Henderson.* 1
2. While, as a general rule, a will and codicil are to be construed as parts of the same instrument, and a codicil is no revocation of a will further than it is so expressed, where the codicil contains dispositions, inconsistent with provisions of the will, the latter will be deemed revoked to the extent of the discordant dispositions, and so far as may be necessary to give effect to the provisions of the codicil. *Newcomb v. Webster.* 191
3. The fact that words of inheritance are now unnecessary to convey a fee does not justify the construction that their use in a will is expressive of an intention that they shall be taken as words substituting in place of a pre-deceased legatee or devisee, his heirs; having a well settled and understood meaning, a different meaning may not be given to the words. *In re Wells.* 896
4. The general rule that when a testamentary gift is found only in a direction to divide at a future time, the gift is future and contingent, and not vested, is subordinate to the primary canon of construction, that the construction

shall follow the intent to be collected from the whole will. *Goebel v. Wolf.* 405

CONTEMPT.

1. Where a final judgment required a formal transfer of stock upon the books of a corporation by its officers, who were defendants, and where two orders, granted upon the foot of said judgment, each fixed a time and place for such transfer and required it to be made, *held*, that the advising and procuring by B., one of the defendants, disobedience of the judgment on the part of the officers was a civil contempt within the Code of Civil Procedure (§ 14, sub. 4). *King v. Barnes.* 476

2. Any person who interferes with the process, control or action of the court in a pending litigation, unlawfully and without authority, is guilty of a civil contempt if his act defeats, impairs, impedes or prejudices the rights or remedy of a party to such action or proceeding. *Id.*

3. When proceedings against B., to punish him for the contempt, were instituted the stock had not been transferred. Before the final order against him was made the officers had yielded obedience to the judgment and orders, thus purging themselves of contempt. B. was sentenced to six months imprisonment. *Held*, no error; that B.'s offense was not an omission to perform something the court had enjoined upon him, and which it was in his power to do, but was an affirmative act of resistance to the process of the court, an active effort to defeat its orders and make its judgment nugatory, and was appropriately punished. (Code Civ. Pro. § 2285.) *Id.*

4. While the main distinction between criminal and civil contempts is that one is an offense against public justice, the penalty for which is essentially punitive, and the other is an invasion of private right, the penalty for which is redress or compensation to the

suitor, still this distinction is not complete and certain; as behind criminal contempts often stands some trace of private rights, and in civil contempts there are sometimes found the element of punishment merely, as distinguished from the bare enforcement of a remedy. *Id.*

5. In the contempt proceedings witnesses were ordered to be examined, who were cross-examined by B., without objection or protest. It was objected on appeal that the court had no power to make such order. *Held*, that B. must be deemed to have assented to the practice adopted. *Id.*

CONTRACT.

1. The provision of the act of 1861 (Chap. 308, Laws of 1861), in relation to contracts by the city of New York, requiring that all contracts "shall be awarded to the lowest bidder for the same with adequate security and every such contract shall be deemed confirmed in and to such lowest bidder at the time of the opening of the bids, estimates or proposals therefor, and such contract shall be forthwith duly executed * * * with such lowest bidder," does not compel the making of a contract by the city with such lowest bidder. While no contract can be let to other than the lowest bidder, the body awarding the contract, acting in good faith, may refuse to award it to him if they deem it for the best interest of the city to do so; they may reject all the bids and re-advertise. *Walsh v. Mayor, etc.* 142

2. In an action upon a promissory note for \$1,500, it appeared that the note was given as the consideration of a contract, whereby the payee, among other things, agreed that *when* the maker "shall pay" the \$1,500 she "shall release and discharge" him from all claims, etc. *Held*, the execution of the release was not a condition precedent to payment, nor was defendant entitled to a concurrent performance, but the payment was

- to precede the release; also, that, upon payment, the contract itself would operate as a release. *Kittz v. Peck*. 223
8. Before a recovery can be had in an action for use and occupation of real estate, it must be made to appear that the conventional relation of landlord and tenant existed between the parties; and while the possession and beneficial enjoyment of real property, with the consent of the owner, is ordinarily sufficient to sustain an action upon an implied agreement for use and occupation, such an agreement may not be implied where the circumstances attending the use and occupation show clearly there was no expectation of rent by either party. *Collyer v. Collyer*. 442
4. So, also, where a person lives with a relative as a member of the family under circumstances showing clearly that there was no expectation on either side that board should be paid, the law will not imply a promise to pay board. *Id.*
5. In pursuance of an ante-nuptial agreement, T., defendants' testator, executed to plaintiff, his wife, an instrument, by which he agreed to pay to her \$10,000 at his death, provided she lived with him as his wife up to that time and faithfully performed the duties of that relationship. Subsequently the parties executed another instrument, by which plaintiff, in consideration of \$5,000 then paid to her by her husband, released and canceled the former agreement. In an action upon said agreement, *held*, that while the latter one, so long as it remained executory, could not have been enforced, yet having been executed, in the absence of any allegation of fraud, plaintiff was not entitled to be relieved therefrom; that having released her husband's obligation she could be reinstated in her rights under it only by a suit in equity instituted for that purpose. *Tallinger v. Mandeville*. 427
6. The defendants, aside from setting up the later agreement, alleged in their answer a violation on plaintiff's part of the conditions precedent contained in the prior one. *Held*, that even if she had been overreached and thus induced to execute the release, she was not entitled to maintain the action until she had repudiated the later agreement and tendered back the money paid. *Id.*
7. Plaintiffs paid into defendant's bank \$500 upon its promise to remit that sum for them to H. at Leadville, Col., receiving a "letter of advice" signed by defendant's cashier, directed to a Leadville bank, which stated that the account of that bank was credited that day with \$500 "received from" plaintiffs "for the use of" H. Plaintiffs forwarded this letter to H., but before its receipt the Leadville bank had failed and a receiver had been appointed, who refused to pay the money. Plaintiffs, on return of the letter, demanded of defendant that it carry out its agreement or refund the money, and upon its refusal, brought this action to recover the same. *Held*, that defendant received the money as a special deposit and was bound to retain it until drawn out under authority of the letter; that by its contract it agreed, in substance, that the Leadville bank would pay the amount on presentation of the letter, and when payment was refused and the letter returned it became at once liable to repay the money to plaintiffs; that the words in the letter that the Leadville bank's "account is credited" with the money were controlled in their general application by the remainder of the clause, *i. e.*, that it was "for the use of" H.; that no contractual relations existed between plaintiffs and the Leadville bank, and no obligation was imposed upon it until it adopted the defendant's act or in some manner assumed the obligation; that the fact that defendant was its correspondent and maintained an account with it did not affect the question. *Cutler v. Am. Ex. Nat. Bank*. 593
8. E., plaintiff's decedent, was the owner at the time of her death, which occurred in 1878, of a promissory note executed by H.,

her husband, defendant's intestate, which, by its terms, fell due in May, 1873. E. left a will, by which she bequeathed the note to certain persons named. H. proposed to the legatees that in case payment was not required, he would upon his death will all his property to them. The note was thereupon surrendered to him; he died intestate in 1883. The will of E. was thereafter probated and letters of administration, with the will annexed, issued to plaintiff. On reference under the statute of a claim based upon the note, *held*, that if there was a valid agreement between H. and those to whom the note was bequeathed, then his estate was not liable upon the note, but only for a breach of the contract agreement, which cause of action belonged to the legatees, not to plaintiff; if the agreement was invalid, then H. remained liable on the note simply, and the statute of limitations was a bar; that defendant was not estopped by the agreement from setting up the bar of the statute, as plaintiff represented none of the parties and was an entire stranger thereto. *Myers v. Cronk*. 608

9. A contract between M., plaintiff's assignor and defendant, for grading and flagging one of its streets, permitted a change of the grade indicated upon the plan and profile of the work without additional compensation. Through the erroneous action of defendant's engineer, not from any intentional change of plan, more work was required of the contractor and additional expense was incurred by him than would have been necessary under the contract. *Held*, that plaintiff was entitled to recover for the additional labor and expense according to its value and amount; that she was not confined to the rate of compensation provided in the contract for similar work. *Mulholland v. Mayor, etc.* 631

CORPORATIONS.

1. The act of 1868 (Chap. 842, Laws of 1868). *SICKELS—VOL. LXVIII.*

of 1868), entitled "An act to provide for the transmission of letters, packages and merchandise in the cities of New York and Brooklyn * * * by means of pneumatic tubes to be constructed beneath the surface," etc., is not violative of the provision of the state Constitution (art. 8, § 16), prohibiting the passage of any local or private bill embracing more than one subject, and requiring that to be expressed in the title. *Astor v. N. Y. Arcade R. Co.* 98

2. The provision in the act authorizing the formation of a corporation for the purpose of carrying out its objects and purposes in the manner specified in the general manufacturing act, clothing it with the powers and privileges conferred and subjecting it to the duties and obligations imposed by said act, so far as not inconsistent with the provisions of said act of 1868, is a matter fairly embraced within the title, and a corporation so formed is an appropriate instrumentality to accomplish the declared purposes. *Id.*
3. A corporation so formed is a manufacturing corporation with powers limited to the accomplishment of the purposes so declared. *Id.*
4. The words "pneumatic tubes," as used in the said act, mean simply tubes for the transmission of parcels, operated by atmospheric pressure applied within the tubes. *Id.*
5. Such tubes are in no sense railways, and the act confers no railroad powers upon a corporation organized as provided therein, and a declaration of the object of the incorporation, contained in a certificate executed and filed for the purposes of such an organization, could give to the corporation no greater powers than those conferred by the act itself. *Id.*
6. The act of 1873 (Chap. 185, Laws of 1873), declared in its title to be "supplemental to and amendatory of" said act of 1868, the title to which is quoted, with the addition of the words "and to provide for

the transportation of passengers in said tubes," is violative of said constitutional provision, as it authorizes the construction of underground railways by the corporation organized under the original act, with authority, upon obtaining the requisite consents, to propel its cars by steam or any other motive power, and thus to transform itself into a railroad corporation. *Id.*

7. To comply with said constitutional requirement the title must be such at least as to fairly suggest or give a clue to the subject dealt with in the act. *Id.*

8. The said act of 1873 being thus unconstitutional and void, all subsequent legislation based upon it, *i. e.*, the acts of 1874, 1881 and 1886 (Chap. 508, Laws of 1874; chap. 454, Laws of 1881; chap. 312, Laws of 1886), fall with it. *Id.*

9. The said act of 1886 is also violative of the constitutional provision (art. 3, § 18), forbidding the passage of a private or local bill granting to any corporation "the right to lay down railroad tracks," except upon the conditions specified, or granting to a private corporation "any exclusive privilege, immunity or franchise whatever." *Id.*

10. The Y. M. C. Association of the city of New York, incorporated under the act of 1886 (Chap. 350, Laws of 1886), is not a seminary of learning within the meaning of the statutory provision exempting from taxation buildings erected for the use of, and used by such institutions. (1 R. S. 388, § 4, subd. 8, as amended by chap. 397, Laws of 1883.) *Y. M. C. A. v. Mayor, etc.* 187

11. Said association erected on lots owned by it on the Bowery a building, the basement of which contained a gymnasium, bowling alley and bath-room; above were twenty-two rooms, one of which only was devoted to purposes of public worship, and that was used also as a lecture hall. In an action to cancel a tax levied upon said premises, *held*, that they were not exempted from taxation under the general act

(*supra*) exempting "every building for public worship" as the same is modified in its application to the city of New York by the "Consolidation Act" (§ 827, chap. 410, Laws of 1882), as it was not exclusively used for such purpose; and, in the absence of any special act exempting it, that the property was liable to taxation. *Id.*

See COLLEGES.

MANUFACTURING COMPANIES.
MUNICIPAL CORPORATIONS.
RAILROAD COMPANIES.
RELIGIOUS CORPORATIONS.

COURTS.

See GENERAL TERM.

SUPERIOR COURT (N. Y. CITY).
SUPREME COURT.
SURROGATES' COURTS.

COVENANTS.

1. The existence of an easement authorizing another to dam up and use the waters of a stream upon lands conveyed, is a breach of a covenant against incumbrances, and knowledge on the part of the grantee at the time of the conveyance or notice to him of the existence of the easement is no defense to an action for the breach. *Huyck v. Andrews* 81

2. *It seems* that any easement, except that of a public highway, is a breach of such a covenant; it protects the grantee against every other adverse right, interest or dominion over the land, and he may rely upon it for his security. *Id.*

3. There is no distinction in this respect between incumbrances which affect the title and those simply affecting the physical condition of the land. *Id.*

4. In an action to recover damages for the breach of such a covenant, it appeared that B. owned an easement in a stream upon the land conveyed, *i. e.*, the right to erect and

maintain a dam across it and to use all of its waters and to extend the dam then existing. At the time of the conveyance there was a dam across the stream which had been maintained for many years, and the waters were used to furnish power to a mill upon B.'s adjoining land. *Held*, that the grantee, although knowing of the existence of the mill and dam, was not charged with knowledge that B had a paramount right to the exclusive use of the waters or a right to extend his dam. *Id.*

5. Defendant alleged in his answer a mistake and asked to have the deed reformed by making the conveyance subject to B.'s easement. *Held*, that evidence of the value of the dam in connection with the mill was incompetent, either upon this issue or the question of damages; that the proper measure of damages was the difference between the value of the land without and with the easement. *Id.*

6. No tax or assessment is a lien or incumbrance within the meaning of a covenant against them until the amount thereof is ascertained or determined. *Harper v. Dorney.* 644

7. Where, therefore, prior to the execution and delivery of a deed of premises in the city of New York containing such a covenant, the work of paving a street had been completed by the city pursuant to an ordinance of the common council duly passed and the expense of the work paid by the city, but the apportionment of the amount upon the persons and property benefited was not made until thereafter, when a proportion thereof was assessed upon the premises conveyed and was paid by the grantee. *Held*, that an action upon the covenant to recover the amount so paid was not maintainable. *Id.*

CREDITOR'S SUIT.

1. Where administrators, upon application of a creditor of their in-

testate, refuse to exercise the power conferred upon them by the act of 1858 (§ 1, chap. 314, Laws of 1858), to disaffirm a transfer made by said intestate to one of the administrators in fraud of the rights of creditors and to reclaim the property fraudulently conveyed, and where the estate in the hands of the administrators proves insufficient to pay the debts, the creditor may bring an action for his own benefit and that of the other creditors to reclaim the property, making all the administrators parties. *Harvey v. McDonnell.* 526

2. It is not essential that the plaintiff in such an action should be a judgment-creditor; he stands simply as trustee in place of the administrators. *Id.*

8. The will of S., after providing for the payment of debts, etc., gave all her property to her executors, in trust, to apply the income therefrom to the education and maintenance of her only son until he should arrive at the age of twenty-five years, the property and accumulations to be then divided equally between her son and husband, with cross-remainders in case of the death of either prior to the time of division. She directed that after her death some legitimate business should be carried on by her executors for the benefit of her son, of which her husband should be retained as manager at a yearly salary. Then followed this provision: "I do hereby authorize and empower my executors to sell or make such other disposition of my real and personal estate as the safe conduct of such business shall seem to them to require." The testatrix at the time of her death was engaged in the merchant tailoring business, which was carried on by defendant, her husband; he was one of the executors and alone qualified, and continued the business after the death of his wife. Plaintiffs sold and delivered to defendant, as executor, certain goods for the purposes of said business. In an action to compel defendant to pay the purchase-price of the goods out of the

assets of the estate in his hands the complaint set forth the foregoing facts, and alleged that, individually, he was irresponsible. *Held*, that plaintiffs were entitled to the relief sought; that the provisions of the will indicated unmistakably an intention on the part of the testatrix to subject her general assets to the debts of the business and to authorize her executors to contract debts therein binding her general estate. *Willis v. Sharp*. 586

CRIMINAL TRIAL.

1. After a witness for the prosecution, on the trial of an indictment for murder, who had witnessed the homicide, had testified to the circumstances attending it, and had shown in his testimony a disposition to favor the prisoner, the district attorney, with the avowed purpose of refreshing his recollection, asked him if he had not previously testified to certain other facts specified. The witness admitted that he had so testified, and upon being asked if it was true, answered that it was. *Held*, that the method pursued to refresh the witness' recollection was proper. *People v. Kelly*. 647

2. It is not sufficient to excuse a person from the consequences of a fatal assault upon another, that he was provoked thereto by an angry controversy of words alone, however aggravating, and when the parties are unequal in strength, and the assaulting party being the stronger, and having no reason to apprehend physical injury from the other, uses a dangerous weapon, the question whether it was used with homicidal intent is one of fact for the jury. *Id.*

DEBTOR AND CREDITOR.

In an action for an accounting as to moneys alleged to have been placed in the hands of S., defendant's testator, by plaintiff for investment, the only evidence presented was a

letter from S, to plaintiff, which, after acknowledging the receipt of the money and that it was drawing interest at seven per cent, continued as follows: "If I can find an opportunity of purchasing a mortgage * * * whereby I can, without risk, secure a greater profit, I shall do so unless you wish to make any other use of the money; should you desire to use it, please let me know." *Held*, that the relation of plaintiff to the decedent was that of a creditor upon a simple contract, not that of a beneficiary under a trust; that the amount was payable at once and the statute of limitations then began to run, and after the lapse of six years was a bar to the action. *Budd v. Walker*. 697

See CREDITOR'S SUIT.

DEED.

1. A deed given by an assignee in bankruptcy contained a recital of the various proceedings in bankruptcy which led to the appointment of the assignee; of the commencement of a suit by him as such assignee against S., wife of the bankrupt, who held the legal title of the real estate in question, to have such title adjudged invalid, and a conveyance of the premises to him in consideration of the discontinuance of such suit, "and other good and valid considerations." *Held*, that this did not make a warranty, either express or by way of covenant, that the recitals were true, or permit a recovery as for a breach on proof that the narration was false, as it was not material to the contract contained in the deed or an inducement to it. *Clark v. Post*. 17
2. The existence of an easement authorizing another to dam up and use the waters of a stream upon lands conveyed, is a breach of a covenant against incumbrances, and knowledge on the part of the grantee at the time of the conveyance or notice to him of the existence of the easement is no defense to an action for the breach. *Huyek v. Andrews*. 81

3. In an action to recover damages for the breach of such a covenant, it appeared that B. owned an easement in a stream upon the land conveyed, *i. e.*, the right to erect and maintain a dam across it and to use all of its waters and to extend the dam then existing. At the time of the conveyance there was a dam across the stream which had been maintained for many years, and the waters were used to furnish power to a mill upon B.'s adjoining land. *Held*, that the grantee, although knowing of the existence of the mill and dam, was not charged with knowledge that B. had a paramount right to the exclusive use of the waters or a right to extend his dam. *Id.*
4. Where, prior to the execution and delivery of a deed of premises in the city of New York, containing a covenant against liens or incumbrances, the work of paving a street had been completed by the city pursuant to an ordinance of the common council duly passed and the expense of the work paid by the city, but the apportionment of the amount upon the persons and property benefited was not made until thereafter, when a proportion thereof was assessed upon the premises conveyed and was paid by the grantee. *Held*, that an action upon the covenant to recover the amount so paid was not maintainable, as the assessment was not a lien at the time of the delivery of the deed. *Harper v. Dowdney.* 644
2. J. deposited a sum of money with defendant in trust for E., his wife, plaintiff's testatrix. A pass-book was delivered to him. After the death of both husband and wife and the issuing of letters testamentary to plaintiff, he called with them at defendant's bank and demanded payment of the deposit; he was told by one of its officers that it would be paid to him when he came with the pass-book which was then in possession of the executor of J.; thereafter the latter presented the pass-book, together with proof of his appointment, and thereupon defendant paid the deposit to him on surrender of the pass-book. In an action to recover the sum deposited it appeared that plaintiff, after learning of the payment, brought suit against J.'s executor to recover the money so paid and recovered judgment therein, and being unable to collect the same, brought this action. *Held* (RUGER, Ch. J., dissenting), that plaintiff had an election of remedies, *i. e.*, either an action against defendant to recover the deposit, or an action against J.'s executor for money had and received; but he was not entitled to both, and by electing the latter remedy he lost the former, as by so doing he adopted and ratified the action of defendant in making the payment, and this would be a good defense in an action by defendant against J.'s executor to recover back the money paid to him. *Fowler v. Bowery Sav. Bk.* 450

— *When deed executed by executors, who have power to sell for certain purposes under the will, is invalid because not in execution of the power.*

See Scholle v. Scholle. 261

DEFENSES.

1. So long as the purchaser of lands remains in possession under his deed he has no defense to an action for the purchase-price. His remedy in case of failure or defect in title is by action on the covenants in his deed or contract. *Kirtz v. Peck.* 222

3. The defense that the payment by the bank had been adopted and ratified by plaintiff was not set up in the answer. This objection was not raised upon the trial, and all the facts pertaining to such defense were proved without objection and were found by the court. *Held*, that the objection was not available here. *Id.*

DEFINITIONS.

The Y. M. C. Association of the city of New York, incorporated under the act of 1866 (Chap. 350, Laws

of 1886), is not a seminary of learning within the meaning of the statutory provision exempting from taxation buildings erected for the use of and used by such institutions. (1 R. S. 338, § 4, sub. 3, as amended by chap. 397, Laws of 1888.) *Y. M. C. A. v. Mayor, etc.* 187

DEVISE.

1. The common-law rule that lapsed devises do not fall into the residue, but go to the heirs as undisposed of by the will, was done away with by the Revised Statutes (2 R. S. 57, § 5), and there is now no difference between lapsed devises and lapsed legacies, as it respects the operation upon them of a general residuary clause. *Cruikshank v. Home for Friendless.* 338
2. The rule of the common law that a legacy or devise, given with or without words of limitation, lapses in case of the death of the devisee or legatee before the testator, in the absence of express words to prevent a lapse, or of something in the context of the will indicating a contrary intent, is still in force in this state, save so far as modified by the Revised Statutes (2 R. S. 66, § 52), *i. e.*, where the devise or bequest is to a child or descendant of the testator. *In re Wells.* 396

See WILLS.

DISCONTINUANCE.

It seems an agreement to discontinue an action includes, as a necessary consequence the vacation of an judgment, either interlocutory or final, entered therein. *Deen v. Milne.* 303

DOWER.

1. Where there is a manifest incompatibility between the provision for a widow in a will and dower, the widow is put to an election between them. *Asche v. Asche.* 232

2. Where the purchaser of the equity of redemption in mortgaged premises, who is under no personal liability to pay the mortgage debt, pays it in aid of his own title, or procures its discharge by giving his own mortgage upon the premises in lieu thereof, as against the widow of his grantor who joined with her husband in the mortgage, but not in the deed, said grantee is entitled to the protection of the mortgagee's right as against the dower which is covered and charged by the mortgage. The purchaser takes his land charged as surety for the mortgage debt, and having paid it, has the right, as against the mortgagors, to be subrogated to the position of the mortgagee and to stand in equity as the purchaser and holder of his security, and the widow seeking to enforce in equity her right of dower, is bound to allow her due proportion of the mortgage debt. *Everson v. McMullen.* 293

EASEMENT.

1. The existence of an easement authorizing another to dam up and use the waters of a stream upon lands conveyed, is a breach of a covenant against incumbrances, and knowledge on the part of the grantee at the time of the conveyance or notice to him of the existence of the easement is no defense to an action for the breach. *Huyck v. Andrews.* 81
2. *It seems* that any easement, except that of a public highway, is a breach of such a covenant; it protects the grantee against every other adverse right, interest or dominion over the land, and he may rely upon it for his security. *Id.*
3. There is no distinction in this respect between incumbrances which affect the title and those simply affecting the physical condition of the land. *Id.*
4. In an action to recover damages for the breach of such a covenant, it appeared that B. owned an ease-

ment in a stream upon the land conveyed, *i. e.*, the right to erect and maintain a dam across it and to use all of its waters and to extend the dam then existing. At the time of the conveyance there was a dam across the stream which had been maintained for many years, and the waters were used to furnish power to a mill upon B.'s adjoining land. *Held*, that the grantee, although knowing of the existence of the mill and dam, was not charged with knowledge that B. had a paramount right to the exclusive use of the waters or a right to extend his dam. *Id.*

5. Defendant alleged in his answer a mistake and asked to have the deed reformed by making the conveyance subject to B.'s easement. *Held*, that evidence of the value of the dam in connection with the mill was incompetent, either upon this issue or the question of damages; that the proper measure of damages was the difference between the value of the land without and with the easement. *Id.*

EJECTMENT.

In an action of ejectment these facts appeared: Pursuant to an application on behalf of plaintiff an act was passed in 1839 (Chap. 246, Laws of 1839), authorizing it to acquire title by condemnation proceedings to land of which that in question is a part. Commissioners of estimate and assessment, purporting to have been appointed in proceedings under the act, made reports therein which were confirmed by the Supreme Court. The city paid the amounts awarded to the owners and immediately took possession of the lands. Pursuant to resolution of the common council a market was erected thereon. In 1842 that body, by resolution, directed a sale of all the other buildings on the land except the market-house. In 1843 a substantial fence was built by the city, inclosing all the land, and thereafter, for about twenty years, it leased the market-house. It also, in 1847 and 1849, erected engine-

houses on the land. The land remained so inclosed and occupied until about 1860, when, pursuant to resolutions of the common council, the buildings were removed, and in 1863 it was thrown open to the public as a park, and was so used down to 1866 or 1867, during all of which time there was a substantial fence around it. In 1867 the land was put up for sale in lots at auction by the commissioners of the sinking fund. The purchasers of some of the lots took title and erected buildings thereon, other purchasers refused to take title and litigations resulted; the lots bid off by them, for five or six years thereafter, were neglected, the fences decayed and the lots were left open to intruders. Defendant and others went into possession of the premises in question in 1878 as mere intruders; he took several deeds from the others; the possession of none of them antedated 1878. In 1871 a committee of the commissioners of the sinking fund, charged with the duty of estimating the value of the real estate belonging to the city, included said premises in their report. This action was commenced in 1878. *Held*, that, without regard to the validity of the condemnation proceedings, as against defendant the city's prior possession authorized a recovery; that there was no such abandonment by it as lost to it the benefit of such prior possession; also, that it had acquired title by adverse possession. *Mayor, etc. v. Carleton.*

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ELECTION OF REMEDIES.

1. J. deposited a sum of money with defendant in trust for E., his wife, plaintiff's testatrix. A pass-book was delivered to him. After the death of both husband and wife and the issuing of letters testamentary to plaintiff, he called with them at defendant's bank and demanded payment of the deposit; he was told by one of its officers that it would be paid to him when he came with the pass-book which was then in possession of the executor of J.; thereafter the latter presented the pass-book, together

with proof of his appointment, and thereupon defendant paid the deposit to him on surrender of the pass-book. In an action to recover the sum deposited it appeared that plaintiff, after learning of the payment, brought suit against J.'s executor to recover the money so paid and recover judgment therein, and being unable to collect the same, brought this action. *Held*, (RUGER, Ch. J., dissenting), that plaintiff had an election of remedies, *i. e.*, either an action against defendant to recover the deposit, or an action against J.'s executor for money had and received; but he was not entitled to both, and by electing the latter remedy he lost the former, as by so doing he adopted and ratified the action of defendant in making the payment, and this would be a good defense in an action by defendant against J.'s executor to recover back the money paid to him. *Fowler v. Bowery Savings Bank.* 450

2. *It seems* that if the money had been left on special deposit, plaintiff could have pursued it in the hands of said executor without losing his remedy against defendant. *Id.*
3. Where a trustee is bound to pay money to a beneficiary as a debt, if he makes payment to another person, this is not a payment of the debt and the moneys paid are not the property of the beneficiary. *Id.*
4. In such case the beneficiary may ignore the payment and sue the trustee as his debtor, or he may ratify and adopt the payment and sue the person who received the money, but he cannot do both, and his election, once effectually made, is conclusive upon him. *Id.*

EMINENT DOMAIN.

1. Where a railroad corporation organized under the "Rapid Transit Act" (Chap. 606, Laws of 1875), is authorized by its charter to construct distinct lines of railway "with the usual and necessary * * * curves, switches," etc., on two streets intersecting each other, it is within the scope of the powers conferred upon the company by the act and its charter to acquire title to, and it may take, by proceedings *in invitum*, lands necessary to effect a junction between the two routes, so as to enable the trains upon one to run upon the other. *In re Un. El. R. R. Co.* 275
2. The provision of said act (§ 26), which permits the junction of two railroads, comprehends the power to take real estate necessary to effect the connection, and it is not material that the two roads are operated by the same corporation. *Id.*
3. While, unless the proposed taking of lands by the law of eminent domain is justified by a purpose or end, permitted or clearly contemplated by the franchise conferred upon a railroad corporation by its charter or the general law, the courts should refuse their aid, the powers of the corporation must be deemed to extend to the accomplishment of legitimate corporate acts, and to whatever may be within the scope of the legislative grant. *Id.*
4. It is for the Supreme Court to investigate the facts upon which the corporation claims the right to take private property against the owner's will, and thereupon to decide whether a sufficient ground exists. *Id.*
5. *It seems*, if the corporate charter authorizes the proposed taking and the action of the corporation appears to be free from any imputation of unworthy or dishonest motives, the court may not interfere with the exercise of the power; the only limit to its exercise is the reasonable necessity of the corporation in the discharge of its duty to the public. *Id.*
6. Where the Supreme Court has granted such an application, and the power to take lands for the corporate purposes is found clearly to exist in the charter and general law, and the purpose stated is one

within the contemplation of the legislative act, this court will not interfere with the conclusions of the Supreme Court as to the necessity for taking the land, if reached after due proceedings as prescribed; its review will be confined to those questions which relate to the validity and legality of the proceedings. *Id.*

EQUITABLE CONVERSION.

1. L. died leaving a widow and no children. His will, after a devise of his residuary real estate to three persons named, his next of kin and heirs, who were non-resident aliens, contained a direction that said real estate be sold at auction by a referee appointed by the Supreme Court, the net proceeds to be deposited in court "in the same manner as money belonging to non-residents" for the use and benefit of the devisees "subject to the further order of the court." In an action for a construction of the will, it appeared that two of the devisees died before the testator; the court found that the gifts to them lapsed, and as to their portions the testator died intestate. The court also found that the direction for a sale worked an equitable conversion of the real estate into personalty and the portion so undisposed of was to be distributed as such; that is, to the widow one-half and \$2,000 in addition. *Held*, error; that the direction for a conversion was simply for the purposes of the will, and while as to the non-resident aliens the doctrine of conversion would, if necessary, apply in their favor, if not required for that purpose, a conversion would not be presumed; and, so far as the widow was concerned, the property undisposed of, whether a sale was necessary or not, devolved according to its original character. *Parker v. Linden.* 28
2. The necessity of a conversion of realty into personalty, to accomplish the purposes expressed in a will, is equivalent to an imperative direction to convert, and effects

an equitable conversion. *Asche v. Asche.* 232

3. Where only a power of sale is given to executors by a will, without explicit and imperative direction for its exercise, and the intention of the testator can be carried out although no conversion is adjudged, the land will pass as such and not be changed into personalty. In the absence of an express direction to sell one may not be implied unless the design and purpose of the testator is unequivocal and the implication so strong as to leave no substantial doubt; and so, unless the exercise of the power is rendered necessary and essential by the scope of the will, the authority is simply discretionary and does not work a conversion. *Scholle v. Scholle.* 261
4. The will of D., and a codicil thereto, gave his residuary estate to his executors in trust, to apply it, or the proceeds of sale, which they were empowered to make, to the establishment and endowment of a charitable institution, whose object and the class of persons to be relieved and benefited thereby should be the same as a charitable institution named. The executors were authorized and directed to apply for and obtain from the state legislature, "as early as practicable," an act of incorporation of such an institution, and to do this, if possible, within ten years after his decease. In the event that the gift "should be adjudged or proved invalid or its execution be impossible, either by judicial decision or from any other cause," the testator directed that all his residuary estate should be sold and the proceeds equally divided among certain existing religious and charitable corporations named, all of whom had capacity to take. In an action for the construction of the will, *held*, that the primary gift was invalid, as there was contemplated a period measured by years, not by lives, during which there would be no person in existence by whom an absolute estate in possession could be conveyed, and so there was an unlawful

suspension of the power of alienation; also, that the gift was not saved by the fact that an institution, such as contemplated by the testator, could have been incorporated under the general law, as such a corporation was not intended or directed, but one formed under a special charter; also, that if the will should be construed as working an equitable conversion of the real estate into personalty this would not affect the question, because considering it as personalty, the prohibition of the statute against a suspension of the absolute ownership of personal property for more than two lives would apply. *Cruikshank v. Home for Friendless*. 337

5. Also, *held*, that, as in the event which has happened, of the vesting of the residue in the corporations named, there was an imperative direction for the conversion of the real estate into money, and a gift of the proceeds, rents and profits went with the residue to the legatees. *Id.*

EQUITY.

1. Where a complaint presents a proper case for equitable jurisdiction, the fact that the possible result of the action may be a personal judgment does not oust the court of jurisdiction, or entitle the defendant to a jury trial. *Van Rensselaer v. Van Rensselaer*. 207
2. A purchaser of mortgaged premises, while technically he takes the fee, acquires simply the equity of redemption, and payment by him of the mortgage is a purchase of the interest carved out by the mortgage as a lien, and in equity he holds the fee under the mortgagee as to that interest, and under his grantor as to the equity of redemption. *Everson v. McMullen*. 293
3. Certain lands, of which G. died seized, descended to plaintiff as heir-at-law, subject to an estate for two lives in a trustee, created by the will of G. Taxes had been assessed upon the lands prior to the

death of the testator. These were paid out of the proceeds of sales of the land pursuant to judgments in a foreclosure suit and in an action for dower commenced after the death of G. Plaintiff and defendant, the executor and trustee under the will of G., were parties defendant to said actions. In an action to compel defendant to restore to the trust fund, out of the personal estate the amount of the taxes, it appeared that the personal estate amounted to more than the taxes, but that there were claims of unpreferred creditors of the decedent largely exceeding the personalty. *Held*, that, while it was the duty of the executor to pay the taxes before paying the unpreferred debts. (2 R. S. 87, § 27), while the proceeds of the sale of the land, as between the heir-at-law and the next of kin or legatees were to be treated as realty, and while the executor, as such, was not vested with administrative authority to sell lands for the payment of debts, yet as, if the executor was required to pay over to himself, as trustee, out of the personalty the amount taken from the real estate to pay taxes, the fund would be liable to be reappropriated on the application of creditors to the payment of general debts, and as, without any action on the part of the executor, the taxes have been paid, the relief asked for was properly denied. *Smith v. Cornell*. 320

4. The administration of assets of the estate of a decedent is peculiarly within the cognizance of equity, and a Surrogate's Court, in adjusting the accounts of executors or administrators, is governed by principles of equity as well as of law; it is not prevented by any rule of law from doing exact justice to the parties, according to the equities, within the confines only of statutory provisions. *In re Niles*. 547

ESTOPPEL.

1. It is only when there is a general reputation that two or more persons are copartners, and they knowing it, permit others to act upon

it, who, induced thereby, give credit to the reputed firm, that these facts can be proved and availed of to estop the reputed members of the firm from denying its existence, and then only in favor of such outside parties. *Adams v. Morrison.* 152

2. In an action to recover rent which had accrued under a lease of a certain pier in New York city, it was admitted that defendant had had the full benefit of the lease in the use of the pier and the collection of wharfage according to its terms. Defendant put his defense on the sole ground that the lease was not made after or in pursuance of any sale by public auction of the privilege conferred, as required by the statute (§ 37, chap. 383, Laws of 1870), which was conceded by the plaintiff. *Held*, that this constituted no defense; that defendant having had the full benefit of the contract, was estopped from questioning its validity. *Mayor, etc., v. Sonneborn.* 423

8. S. died in 1873 intestate, leaving him surviving a widow and a daughter, E., his only child and next of kin. The widow being deemed incompetent, on petition of E. letters of administration were issued to her and one N. They soon after made up between themselves an inventory, but none was filed until 1882. Most of the estate consisted of mortgages on real estate. E. allowed N. to have control of the assets, and as moneys were realized thereon, he loaned them on bonds and mortgages which were taken in E.'s name, individually. Other moneys were deposited in her name and were drawn upon by her as required. In 1882 N. failed, and thereupon E. took possession of the securities, and proceedings were instituted for an accounting by N. Upon the accounting N. credited himself with the investments so made on bonds and mortgages as payments to and for the use of E. The surrogate rejected this claim, and in his decree charged N. with the moneys represented by the securities, and required him to pay over to E., as next of kin, her dis-

tributive share thereof, and upon his complying with the decree required E. to transfer to him said securities. *Held*, error; that, conceding E. could refuse to accept or be bound by the securities as payments, she could not retain them, and at the same time claim that the items in the account representing them should be disallowed, but should have been required to transfer them to N. as a condition precedent to his being charged with the amounts; but, *held*, that assuming the investments were irregular and constituted breaches of trust, in the absence of proof of fraud or misrepresentations, just so far as E. had the means of knowing of her co-administrator's acts and assented to or acquiesced in them, either expressly or by her passiveness, she was bound and was estopped from objecting thereto. *In re Niles.* 547

4. Also, *held*, that it was immaterial whether N. treated the investments when made as for the estate or as payments to E.; that she being co-administratrix as well as beneficiary, and the widow's rights not being affected, was bound in either case; that she could not stand by and see an improper use made of the assets and thereafter claim immunity in her official, or advantage in her private capacity. *Id.*
5. E., plaintiff's decedent, was the owner at the time of her death, which occurred in 1878, of a promissory note executed by H., her husband, defendant's intestate, which, by its terms, fell due in May, 1873. E. left a will, by which she bequeathed the note to certain persons named. H. proposed to the legatees that in case payment was not required, he would, upon his death, will all his property to them. The note was thereupon surrendered to him; he died intestate in 1883. The will of E. was thereafter probated, and letters of administration, with the will annexed, issued to plaintiff. On reference under the statute of a claim based upon the note, *held*, that if there was a valid agreement between H. and those to whom the note was bequeathed, then

his estate was not liable upon the note, but only for a breach of the contract agreement, which cause of action belonged to the legatees, not to plaintiff; if the agreement was invalid, then H. remained liable on the note simply, and the statute of limitations was a bar; that defendant was not estopped by the agreement from setting up the bar of the statute, as plaintiff represented none of the parties and was an entire stranger thereto. *Myers v. Cronk.* 608

EVIDENCE.

1. In an action brought by the purchaser against the executors of the assignee to recover back the purchase-money paid, the complaint alleged that at the time of the sale, before offering the premises, the assignee "stated that he had a good title to it," and could and would give a good title as against S.; that plaintiff bid off and paid for the property and accepted a deed thereof, relying upon that statement, and in consideration thereof, and upon the express understanding and condition that the assignee "would indemnify and protect her against any interest in or title to said premises which might thereafter be legally established and enforced" by S.; that S. subsequently brought an action of ejectment against plaintiff and the assignee, and, under judgment therein in her favor, recovered possession. There was no averment that the assignee acted fraudulently or with intent to deceive. On the trial plaintiff asked a witness as to the statements made by the assignee at the time of the sale; this was objected to on the ground that whatever statements were made were merged in the written contract. The objection was overruled. *Held*, error. *Clark v. Post.* 17
2. Plaintiff was also permitted to show that he paid the purchase-price and accepted a deed under an agreement on the part of the assignee that he would hold the money until the claim of S. was decided. This was objected to on the ground that nothing of the kind was alleged in the complaint. No request to amend the complaint was made. The objection was overruled. *Held*, error. Also that, as without this evidence no cause of action was established, a refusal to dismiss the complaint was error. *Id.*
3. Where, upon the trial of an issue of fact by a surrogate, the evidence on each side is so nearly balanced that a determination either way would not be reversed upon appeal, it may not be said that the losing party is not prejudiced by material testimony of an incompetent witness, given under objection and exception, and the admission of such testimony is error requiring a reversal. *In re Eysaman.* 62
4. Where the probate of a will is contested on the ground of want of testamentary capacity on the part of the testator, and that the will was not duly executed, a legatee or devisee, who is not a subscribing witness, is not competent, under the Code of Civil Procedure (§ 829), to testify to personal transactions or communications with the decedent, preceding, attending or succeeding the execution of the will. *Id.*
5. This rule excludes not only testimony of transactions directly between the witness and the deceased and communications made by the latter to the former, but of any transaction between the deceased and others, in any portion of which the witness participated, or any conversation in his hearing, although not with or addressed to him; also, any testimony as to the acts and conduct of the testator observed by the witness tending to show mental capacity. *Id.*
6. The provision of said Code (§ 2544), providing that "a person is not disqualified or excused from testifying respecting the execution of a will by a provision therein whether it is beneficial to him or otherwise," refers only to the subscribing witnesses to a

- will; it does not operate as a repeal by implication, so far as it relates to testimony as to the execution of a will of the prohibitory clause above referred to; nor does it authorize or permit a beneficiary under the will to testify where, under the former clause, his testimony would be excluded. *Id.*
7. In an action to recover damages for the breach of a covenant in a deed against incumbrances it appeared that B. owned an easement in a stream upon the land conveyed, *i. e.*, the right to erect and maintain a dam across it, and to use all of its waters and to extend the dam then existing. At the time of the conveyance there was a dam across the stream which had been maintained for many years, and the waters were used to furnish power to a mill upon B.'s adjoining land. Defendant alleged in his answer a mistake and asked to have the deed reformed by making the conveyance subject to B.'s easement. *Held*, that evidence of the value of the dam in connection with the mill was incompetent, either upon this issue or the question of damages; that the proper measure of damages was the difference between the value of the land without and with the easement. *Huyck v. Andrews.* 81
8. In an action wherein plaintiff sought to establish a copartnership between himself and defendant's intestate, as attorneys, plaintiff, as a witness in his own behalf, was allowed to testify to declarations of the deceased to third persons in his presence to the effect that they were copartners. He was then asked: "Who received the receipts of the office?" "Was money paid into the office?" and offered to testify that he did not receive money paid into the office for business done in the office, and that the charges made in a certain case, in which he appeared as attorney, were paid to decedent. This was excluded as immaterial and incompetent under the Code of Civil Procedure (§ 829.) *Held*, no error. *Adams v. Morrison.* 152
9. Plaintiff offered to prove, by his own testimony, that about the time he claimed the partnership was formed the deceased made an entry in his presence, in a docket or register, of name of himself and plaintiff as a firm. This was objected to as incompetent under the said Code and excluded. *Held*, no error; that it involved a personal transaction between the witness and deceased. *Id.*
10. W., plaintiff's testator, a stockbroker, was carrying certain stock for S. on a margin; the margin having become inadequate, defendant executed to W. a written guaranty for any loss sustained "by reason of the holding and carrying of said stock." Upon the trial of an action upon said guaranty S. was called as a witness by defendant, and having testified that he gave instructions to W. in November, 1881, with reference to a sale of the stock, was asked to state those instructions. This was objected to on the ground that the witness, being the principal debtor, was interested in the event of the action and so was incompetent to testify to a personal transaction with W. under the Code of Civil Procedure (§ 829.) The objection was sustained. It did not appear that S. had received any notice from defendant to defend or had undertaken the defense. *Held*, error; that S. was a stranger to the action and not interested within the meaning of said Code; that before he could be bound by the judgment he must have been placed, by formal notice to defend or something tantamount to such notice from the defendant, in a situation calling upon him to assume control of the action, or to aid in its defense, as though a party, with the right to adduce testimony and cross-examine witnesses and appeal from the judgment; that the simple fact that he was called as a witness by his surety did not bind him by the result of the litigation. *Wallace v. Straus.* 233
11. It seems the provision of the Code of Civil Procedure (§ 395), declaring that in order to take a case out of the statute of limita-

tions, an acknowledgment or promise to pay in writing, signed by the party to be charged, is necessary, but that this "does not alter the effect of payment of principal or interest;" does not change the nature or effect of a part payment. The old rule is recognized and continued and the payment may be proved by oral evidence. *Mills v. Davis.* 248

12. In order to make an indorsement upon a promissory note of part payment made by the holder, without the privity of the maker, competent as evidence to meet the defense of the statute of limitations, it must appear that it was made at the time when its operation would be against the interest of the party making it; and so, at least, that it was made before the statute could have operated. *Id.*

13. Upon a reference under the statute of a claim by an executor against the estate of a deceased person, which claim was founded upon a promissory note, the defense was the statute of limitations. The note bore indorsements of payment of interest made by plaintiff. Plaintiff himself and two other witnesses who were entitled under the will each to one-third of whatever was collected on the note, were permitted to testify, under objection and exception, that the indorsements were made by plaintiff during the lifetime of plaintiff's testator. *Held*, that the testimony was incompetent under the Code of Civil Procedure (§ 829). *Id.*

14. In an action by an executor to recover damages for the alleged conversion of certain promissory notes, it was conceded that the notes, before the death of plaintiff's testatrix, belonged to her, and that thereafter defendant had possession of them. The issue was as to whether she gave them to him or whether he wrongfully became possessed thereof. Plaintiff, as a witness in his own behalf, testified that a few hours before the death of decedent, when she was in an unconscious state, which continued until her death, he saw the notes in her trunk; that just

after her death he looked again and they were gone, and that defendant was in the house and had an opportunity to take them. Defendant, as a witness in his behalf, was permitted to testify that he had possession of the notes a week before the death of deceased, and that they were in his possession when the executor testified he saw them in the trunk; he was then asked: "Did you take them (the notes) from any person without their consent?" This was objected to as incompetent, under the Code of Civil Procedure (§ 829), and was excluded. *Held*, that if the ruling was erroneous, as the testimony was only proper in rebuttal, not to establish an affirmative defense, and as defendant, if believed, had already thoroughly and perfectly rebutted plaintiff's evidence, the error did not justify a reversal. *Lewis v. Merritt.* 886

15. *It seems* that plaintiff's testimony tended to establish that there had been no personal transaction between deceased and defendant by which his possession could have been rightful, and it was thereby made competent for defendant to testify that he took the notes with her consent, and so rightfully. *Id.*

16. In an action against sureties for the tenants upon a lease of certain hotel property, brought by McD., the landlord, but continued after his decease by his executors, the defense was that defendants were induced to become sureties by reason of certain false and fraudulent representations made by decedent to them. On the trial defendants proved that when the tenants came to defendant W. and asked him to become a surety, he requested them to go to McD. and make certain inquiries as to the business done at the hotel, so that he might judge as to the propriety of his consenting to become a surety; that they went with another of the sureties and a third person and that McD. made to them the representations set forth in the answer. Defendant W. and one of the tenants were then called as witnesses for the defense and were asked as to what was said to

W. on the tenant's return from the interview with McD. This was objected to and excluded as incompetent under the Code of Civil Procedure (§ 829.) *Held*, error; that, conceding the testimony was incompetent to prove what representations were, in fact, made by McD., as defendants were bound to prove, in addition to this, that the representations were communicated to them and that they were thereby induced to become sureties, having proved by a competent witness what representations were made, it was competent to prove by the witnesses called that they were communicated to W.; that this was not a personal conversation with deceased. *Hill v. Woolsey*. 891

17. On trial of an action to recover an alleged loan, plaintiffs gave in evidence a check signed by their intestate, payable to defendant, and proved that it was delivered to, indorsed by and paid to him; they then called him as a witness and proved by him that at the time of the delivery of the check said intestate did not owe him anything. As a witness in his own behalf he was asked to state what took place between decedent and himself. This was objected to and excluded as incompetent under the provision of the Code of Civil Procedure (§ 829), excluding the testimony of a party against an executor, etc., in relation to a personal transaction with the decedent. *Held*, error; that said provision did not abrogate the rule of evidence, that where a party calls a witness and examines him as to part of a communication or transaction, the other party may call out the whole, so far as it bears upon or tends to explain the part called out; that, as the testimony of defendant called out by plaintiff tended to rebut the presumption that the transaction *i. e.*, the giving of the check, was the payment of a debt, and to raise the presumption that it was a loan, this opened the whole transaction and entitled defendant to testify in his own behalf in regard thereto. *Nay v. Curley*. 575

18. After a witness for the prosecu-

tion, on the trial of an indictment for murder, who had witnessed the homicide, had testified to the circumstances attending it, and had shown in his testimony a disposition to favor the prisoner, the district attorney, with the avowed purpose of refreshing his recollection, asked him if he had not previously testified to certain other facts specified. The witness admitted that he had so testified, and upon being asked if it was true, answered that it was. *Held*, that the method pursued to refresh the witness' recollection was proper. *People v. Kelly*. 647

See ADMISSIONS AND DECLARATIONS.

EXECUTOR AND ADMINISTRATOR.

1. Certain lands, of which G. died seized, descended to plaintiff as heir-at-law, subject to an estate for two lives in a trustee, created by the will of G. Taxes had been assessed upon the lands prior to the death of the testator. These were paid out of the proceeds of sales of the land pursuant to judgments in a foreclosure suit and in an action for dower commenced after the death of G. Plaintiff and defendant, the executor and trustee under the will of G., were parties defendant to said actions. In an action to compel defendant to restore to the trust fund, out of the personal estate, the amount of the taxes, it appeared that the personal estate amounted to more than the taxes, but that there were claims of unpreferred creditors of the decedent largely exceeding the personalty. *Held*, that while it was the duty of the executor to pay the taxes before paying the unpreferred debts (§ R. S. 87, § 27), while the proceeds of the sale of the land, as between the heir-at-law and next of kin or legatees were to be treated as realty, and while the executor, as such, was not vested with administrative authority to sell lands for the payment of debts, yet as, if the executor was required to pay over to himself, as trustee, out of the per-

sonalty the amount taken from the real estate to pay taxes, the fund would be liable to be reappropriated on the application of creditors to the payment of general debts, and as, without any action on the part of the executor, the taxes have been paid, the relief asked for was properly denied. *Smith v. Cornell*. 320

2. Where administrators, upon application of a creditor of their intestate, refuse to exercise the power conferred upon them by the act of 1858 (§ 1, chap. 814, Laws of 1858), to disaffirm a transfer made by said intestate to one of the administrators in fraud of the rights of creditors and to reclaim the property fraudulently conveyed, and where the estate in the hands of the administrators proves insufficient to pay the debts, the creditor may bring an action for his own benefit and that of the other creditors to reclaim the property, making all the administrators parties. *Harvey v. McDonnell*. 526
3. It is not essential that the plaintiff in such an action should be a judgment-creditor; he stands simply as trustee in place of the administrators. *Id.*
4. S. died in 1878 intestate, leaving him surviving a widow and a daughter, E., his only child and next of kin. The widow being deemed incompetent, on petition of E. letters of administration were issued to her and one N. They soon after made up between themselves an inventory, but none was filed until 1882. Most of the estate consisted of mortgages on real estate. E. allowed N. to have control of the assets and as moneys were realized thereon, he loaned them on bonds and mortgages which were taken in E.'s name, individually. Other moneys were deposited in her name and were drawn upon by her as required. In 1882 N. failed, and thereupon E. took possession of the securities, and proceedings were instituted for an accounting by N. Upon the accounting N. credited himself with the investments so made on bonds and mortgages as payments to and for the use of E. The surrogate rejected this claim, and in his decree charged N. with the moneys represented by the securities, and required him to pay over to E., as next of kin, her distributive share thereof, and upon his complying with the decree required E. to transfer to him said securities. *Held*, error; that conceding E. could refuse to accept or be bound by the securities as payments, she could not retain them, and at the same time claim that the items in the account representing them should be disallowed, but should have been required to transfer them to N. as a condition precedent to his being charged with the amounts; but, *held*, that assuming the investments were irregular and constituted breaches of trust, in the absence of proof of fraud or misrepresentations, just so far as E. had the means of knowing of her co-administrator's acts and assented to or acquiesced in them, either expressly or by her passiveness, she was bound and was estopped from objecting thereto. *In re Niles*. 547
5. Also, *held*, that it was immaterial whether N. treated the investments when made as for the estate or as payments to E.; that she being co-administratrix as well as beneficiary, and the widow's rights not being affected, was bound in either case; that she could not stand by and see an improper use made of the assets and thereafter claim immunity in her official, or advantage in her private capacity. *Id.*
6. The administration of assets of the estate of a decedent is peculiarly within the cognizance of equity, and a Surrogate's Court, in adjusting the accounts of executors or administrators, is governed by principles of equity as well as of law; it is not prevented by any rule of law from doing exact justice to the parties, according to the equities, within the confines only of statutory provisions. *Id.*
7. Where a will gave the testator's residuary estate to his executors in trust, with authority to sell the real estate and to divide the whole into specified parts, each to be kept invested and the income

paid to a beneficiary named during life, *held*, that upon the division, the duties of the executors, as such, ceased, and they held the property as trustees; and so, they were entitled to double commissions. *In re Crawford*. 560

8. *It seems* the intention of a testator to confer on his executor power to continue a trade or business will not be deemed to have been conferred unless it is found in the direct, explicit and unequivocal language of the will. *Willis v. Sharp*. 586

9. *It seems*, also, that when the power *simpliciter* is conferred, it only authorizes the use of the fund invested in the business at the time of the testator's death; the general assets may not be used unless such an intent on the part of the testator is expressed in the will. *Id.*

10. When such an intent does not appear a creditor has no remedy except to pursue the assets embarked in the trade or business at the time of the death. *Id.*

11. A testator may, however, bind his general assets for all of the debts; and where such an intent finds expression in his will, in case of the insolvency of the executor, the general assets may be made liable in equity for the debts. *Id.*

—When deed executed by executors, who have power to sell for certain purposes under the will, is invalid, because not in execution of the power.

See Scholle v. Scholle.

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FIDUCIARY RELATION.

1. Although, as a general rule, fraud is not to be presumed, and a party seeking to relieve himself from an obligation on that ground must prove it, yet when the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality, and that either on the one side from superior knowledge of the matter derived

from a fiduciary relation, or from over-mastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced or undue influence used, and that all was fair, open, voluntary and well understood. *Green v. Roworth*. 463

2. Where, therefore, a father, an aged man, who had become much enfeebled, mentally and physically, took his two sons into partnership and turned over to them the management and control of his property and business affairs, and was accustomed to rely upon their advice and counsel, and after they had already obtained from him the larger portion of his property without any adequate consideration, he, without consideration, in the absence of a legal adviser, executed to them a deed of his real estate in ignorance of its legal effect; the conveyance leaving the grantor comparatively destitute, *held*, that fraud was legally imputable to the grantees, requiring explanation from them; and this not having been given, that a finding of fraud and undue influence was justified. *Id.*

FINDINGS OF LAW AND FACT.

While, where findings of fact by a court or referee are irremediably conflicting, this court will be governed by that finding which is most favorable to the appellant, it is the duty of the court to reconcile and give to each some office to perform, and it is only when this cannot, by a reasonable construction, be accomplished, that the rule has effect. *Green v. Roworth*. 462

FORECLOSURE

1. The will of R., after giving certain specific legacies, gave to his

executors his residuary estate in trust, with power to receive the rents and profits, sell and convey the property, invest both the rents and profits and proceeds of sale "and to divide and apply the same and income thereof," as directed, *i. e.*, to apply the income of two-sixths of "said residue and remainder" to the use of his wife for life, with remainder over to his children, and to apply the income of one-sixth to each of his four children during life with remainder over to the issue of such child, and with authority to advance to each child a specified sum out of the principal if the executors should deem best. In the gift of the legacies the testator used the words "give and bequeath," in those of the residuary estate the words used were "devise and bequeath." *Held*, that the final and ultimate division did not require a conversion of the land into money, nor was such a conversion required as respects the intermediate income; that, therefore, the remaindermen took a vested interest in the lands; and that the interests of the grandchildren were not cut off by a foreclosure suit, to which they were not made parties. *Scholle v. Scholle*. 261

2. In 1871 W. executed to H. a power of attorney, authorizing him, among other things, to collect and receive moneys becoming due from any person to his principal and to execute discharges therefor, etc. H. purchased a bond and mortgage, receiving an assignment thereof to W., and as agent collected the interest thereon as it fell due, receipting therefor in the name of W. The latter died in Germany in January, 1874. The bond fell due in May of that year and was paid by B., the then owner of the mortgaged premises, to H., who executed a satisfaction of the mortgage and delivered to the payor the bond and mortgage, the assignment and the power of attorney. H. knew, at the time, of the death of W., but he did not disclose the fact to B. and the latter made no inquiries. In an action brought in 1885 to foreclose the mortgage the court found that H.

never accounted to plaintiff, administratrix of W., for the bond and mortgage or the proceeds, and that plaintiff never assented to or ratified the payment, and did not know of the existence of the bond and mortgage or the cancellation thereof until within a short time of the commencement of the action. *Held*, that the payment was invalid, and in the absence of evidence that the personal representatives of the decedent assented or ratified it, was no defense; that the fact that H. had possession of the securities did not affect the question, as B. had full notice of the extent of and limit to the authority of H. *Weber v. Bridgman*. 600

FOREIGN JUDGMENT.

1. In an action upon a personal judgment of a Canada court the complaint alleged, as the ground of jurisdiction, that defendant appeared in the action. The answer denied this allegation and affirmatively alleged that the court had no jurisdiction to render the judgment, as defendant neither appeared in the action nor was served with process. Upon the trial plaintiff introduced the judgment record, which showed on its face that the service was made upon defendant at his residence within this state. *Held*, that the service was ineffectual to give the judgment validity here, if defendant was not a citizen of Canada or domiciled within that jurisdiction; that defendant's place of residence is to be presumed his domicile, and nothing having been shown to rebut that presumption, the service was ineffectual and the judgment had no validity here. *Shepard v. Wright*. 582
2. No rule of comity requires this court to give effect to a personal judgment rendered under a foreign law where, on the face of the record, it appears that jurisdiction of the person of the defendant was not obtained. *Id.*

FORMER ADJUDICATION.

1. The will of P., executed in 1871,

after various legacies which he directed to be paid out of a certain fund, gave a legacy of \$10,000 to the testator's sister E., the directions for the payment of which were as follows: "To be paid by my executors when it shall be convenient for them, without regard to the time fixed by law, out of the moneys derived from the sale of the Van Schaick farm, * * * or otherwise, as it shall seem best to them. It is further my will that this legacy shall be deemed subservient to all others." Following this was a gift of the residuary estate. The testator had, previous to the execution of the will, entered into a contract with agents for the sale of the farm mentioned, in city lots. He died in March, 1873. Previous to June, 1874, there had been paid over to the sole acting executor, or upon his order to the residuary legatee, over \$15,000 of proceeds "derived from the sale" of said lots, and said legatee received more than sufficient to pay the legacy to E. In an action against said executor and legatee for an accounting and to compel payment to E. of said legacy it appeared that the executor had had a final settlement of his accounts. Upon that settlement, against the objection of E., the executor was allowed to exclude from his account the proceeds of the farm sales, and the account was settled without regard thereto. *Held*, that the decree of the surrogate upon such settlement was no bar to this action. (Code Civ. Pro. § 2742.) *Van Rensselaer v. Van Rensselaer*.

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2. In an action to compel the specific performance of a contract on the part of defendant to purchase certain property situate in the county of New York, these facts appeared: C. died intestate in Indiana in 1845, seized of the premises. In 1850 one P., a creditor of C., obtained letters of administration of his goods, etc., from the Surrogate's Court of Richmond county. The petition upon which the letters were granted stated that C. "died possessed of personal property in the state of New York." Subsequently, and before letters were is-

sued, the petitioner presented an affidavit showing the existence of assets in Richmond county. The letters recited that C. left assets unadministered in said county. P. subsequently made due application for authority to mortgage, lease or sell the real estate of C. for the payment of his debts, and in 1851 such authority having been granted, the premises in question were sold to plaintiff's testator A., who died in 1872. In 1886 the agreement in question was executed between his executors and defendant. Defendant objected to the title that the Surrogate's Court did not acquire jurisdiction to issue letters to P. as administrator of C., and that the proceedings instituted by P. for a sale of the real estate were defective and ineffectual to confer any title to the land. *Held*, untenable; that the statutory requirement of assets in the county was met by the petitioner; that the recital in the letters was *prima facie* evidence of the existence of the facts stated, and the record showed that the necessary facts were alleged and proved upon which the surrogate acted in granting them; that his determination upon the proofs, however erroneous, cannot be disturbed by an attack upon it in a collateral proceeding. *O'Connor v. Huggins*. 511

8. Although Surrogates' Courts are courts of special and limited jurisdiction, where jurisdiction to act exists their orders or decrees are conclusive until they are revoked or reversed on appeal. (3 R. S. 80, § 56.) *Id.*

FRAUD.

1. Although, as a general rule, fraud is not to be presumed, and a party seeking to relieve himself from an obligation on that ground must prove it, yet when the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality, and that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from over-mastering

influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced or undue influence used and that all was fair, open, voluntary and well understood. *Green v. Roworth*. 462

2. Where, therefore, a father, an aged man, who had become much enfeebled, mentally and physically, took his two sons into partnership and turned over to them the management and control of his property and business affairs, and was accustomed to rely upon their advice and counsel, and after they had already obtained from him the larger portion of his property without any adequate consideration, he, without consideration, in the absence of a legal adviser, executed to them a deed of his real estate in ignorance of its legal effect; the conveyance leaving the grantor comparatively destitute, *held*, that fraud was legally imputable to the grantees, requiring explanation from them; and this not having been given, that a finding of fraud and undue influence was justified. *Id.*

FRAUDULENT CONVEYANCES.

1. Where conveyances of real estate, made by a judgment-debtor, have been set aside as fraudulent in an action brought by the judgment-creditors, and the grantee is called upon to account for the rents and profits, although adjudged to be a guilty participant in the fraud, he is entitled to be allowed on the accounting sums paid by him for taxes, interest on mortgages on the premises accruing while he occupied them, and repairs actually necessary for the preservation of the property and to keep the same tenantable, but he is not entitled to be allowed for insurance premiums paid by him, save so much as has been adopted by and has insured to

the benefit of the judgment-creditors. *Loos v. Wilkinson*. 485

2. Such an accounting must be on equitable principles, and when the fraudulent grantor has been compelled to surrender the property and to account for all the profits, he has, could or ought to have made, the ends of justice have been obtained. *Id.*

GENERAL TERM.

1. Where, upon appeal in an action tried by the court, the General Term reverses the judgment and it appears by its order that the reversal was upon questions, both of law and fact, it will be deemed to have based its decision upon errors of fact, if that be necessary to sustain such decision. *Lowery v. Erskine*. 52
2. *It seems* that to justify a reversal upon the facts by the General Term, it must appear that the findings were against the weight of evidence, or that the proofs so clearly preponderated in favor of a contrary result that it can be said, with a reasonable degree of certainty, that the trial court erred in its conclusions. *Id.*

GIFT.

1. While the proof to establish an alleged gift *causa mortis* must be clear and convincing, it is not correct to charge the jury that the presumptions of law are against it, or that the fact of the gift must be proved beyond suspicion. *Lewis v. Merritt*. 386
2. T. deposited certain moneys in a bank and in a trust company to the credit of his daughter C. The first deposit was made in her presence and for her personal use. The deposits were entered in a pass-book which was delivered by T. to C. The latter drew out the deposits in bank and deposited them in the trust company, where they were included in the account with the

deposit then made by T. *Held*, that there was a valid and irrevocable gift, fully completed and executed, vesting the absolute title to the deposits in C. *In re Crawford*. 560

3. T. purchased certain coupon bonds, payable to bearer, which were kept by him up to the time of his death, and he cut off and collected the coupons as they fell due, except those falling due during six months prior to his death. At the time of the purchase of the bonds T. stated that he wanted them for C., and afterwards he directed his banker, who made the purchase for him, to have them registered in her name. The banker took them to the office of the company which issued them, and the name of C. was indorsed on each bond, with date of indorsement and name of the transfer agent. It did not appear that C. knew anything of the transaction. *Held*, that, as there was no delivery of the bonds, there was no completed gift. *Id.*

4. The bonds were issued by a foreign corporation and made payable in New York or Philadelphia. *Held*, that the act of 1871 (Chap. 84, Laws of 1871), providing for the registry of railroad and other corporate mortgage bonds did not apply; that it applied only to bonds which have been or may be issued, and are payable in this state; but that even if said act was applicable, the registry did not change the legal title to the bonds while the original owner continued to hold them; that the title would not pass until a delivery of the bonds to the intended donee or to some one for her, although the general negotiability of the bonds might have been destroyed by the indorsement. *Id.*

5. F. left a will, executed after all of the deposits, except one small one, were made, by which various legacies were given to C. *Held*, that there was no ademption of the legacies by the gift of the moneys deposited, nor were they deemed *pro tanto* by the deposit made after the execution of the will. *Id.*

GUARANTY.

W., plaintiff's testator, a stock-broker, was carrying certain stock for S. on a margin; the margin having become inadequate, defendant executed to W. a written guaranty for any loss sustained "by reason of the holding and carrying of said stock." The stock at that time was worth in the market more than the amount due W. Subsequently, after notice to S. and defendant to take up and pay for the stock, and that in case of failure, the same would be sold at public auction at a time and place specified, the stock was sold in accordance with such notice. In an action upon said guaranty, *held*, that it was not a guaranty of collection requiring the remedy against the principal debtor to be first exhausted before enforcing it; but it was a loss as ascertained by a sale of the stock which was contemplated by the parties as the subject of the guaranty, and plaintiff was entitled to recover the loss as so ascertained. *Wallace v. Straus*. 238

HIGHWAYS.

1. There is always reasonable ground for apprehending accidents from obstructions in a public highway, and any person who wrongfully places them there or aids in so doing is responsible for accidents occurring by reason of their presence. *Cohen v. Mayor, etc.* 532
2. Where a municipal corporation, without the pretense of authority and in direct violation of a statute, assumes to grant to a private individual the right to obstruct one of its streets while in the transaction of his private business, and for such privilege takes compensation, it must be regarded as itself maintaining a nuisance so long as the obstruction is continued by reason of and under the license, and it is liable to damages naturally resulting therefrom to a third person. *Id.*
3. M., a grocer, doing business in the city of New York, was in the

habit of keeping his grocery wagon, when not in use, standing day and night in the street in front of his store under a permit to do so, granted to him by the city, for which an annual license fee was paid. When so standing the thills were raised perpendicularly and held up by strings. A passing ice wagon struck the grocery wagon and turned it partially around, the strings holding up the thills gave way and they came down upon the sidewalk striking plaintiff's intestate, who was passing thereon, causing his death. In an action to recover damages, *held*, that the license was issued without authority (§ 86, sub. 4, chap. 410, Laws of 1882); that the storing of the wagon in the highway was a public nuisance; that defendant by licensing it made itself liable for any damages resulting therefrom, the same as if it had itself maintained the nuisance; and that, as the accident happened because of the presence of the obstruction, it was the proximate cause of the injury. *Id.*

HUSBAND AND WIFE.

1. In pursuance of an ante-nuptial agreement, T., defendant's testator, executed to plaintiff, his wife, an instrument, by which he agreed to pay to her \$10,000 at his death, provided she lived with him as his wife up to that time and faithfully performed the duties of that relationship. Subsequently the parties executed another instrument, by which plaintiff, in consideration of \$5,000 then paid to her by her husband, released and canceled the former agreement. In an action upon the original agreement, *held*, that while the later one, so long as it remained executory, could not have been enforced, yet having been executed, in the absence of any allegation of fraud, plaintiff was not entitled to be relieved therefrom; that having released her husband's obligation, she could be reinstated in her rights under it only by a suit in equity instituted for that purpose. *Tallinger v. Manderille.* 427

2. The defendants, aside from setting up the later agreement, alleged in their answer a violation on plaintiff's part of the conditions precedent contained in the prior one. *Held*, that even if she had been overreached and thus induced to execute the release, she was not entitled to maintain the action until she had repudiated the later agreement and tendered back the money paid. *Id.*

INFANTS.

1. The simple fact that a machine is dangerous does not make an employer liable for an injury received by a minor employed in operating it. *Buckley v. G. P. & R. M. Co.* 540
2. Where the minor is familiar with the machine, and its character and operation are obvious, and he is aware of and fully appreciates the danger to be apprehended from working it, he takes upon himself the risks incident to the employment the same as a person of mature age. *Id.*

INJUNCTION.

1. After a final judgment in an action which does not award an injunction, staying finally and entirely the enforcement of a judgment in another court, and reserves no right to apply upon the foot of the decree, that relief may not be granted by order on affidavits. *Jackson v. Bunnell.* 216
2. A permanent injunction is in no sense a provisional remedy, and can only be granted where the pleadings in an action show its necessity and the remedy is asked as an element of the final relief sought (Code Civil Pro. § 602); and so, it may not be granted by mere order when no action between the parties is pending, although actions covering the controversy have gone to final judgment. *Id.*

INSURANCE (LIFE).

1. Defendant, a foreign life insurance company, doing business in this state, issued a policy to P., plaintiff's intestate. Before a payment of premium became due it sent to P. a notice, in attempted compliance with one of the conditions of forfeiture for non-payment of premiums imposed by the act of 1877 (Chap. §21, Laws of 1877), i. e., that "a notice stating when the premium will fall due, and that if not paid the policy * * * will become forfeited and void" must "be duly addressed and mailed to the person whose life is assured, at his last known post-office address, postage paid," at least thirty and not more than sixty days before the premium is payable. The notice, after stating the amount of the premium, the time when it would fall due, where it was to be paid, and that the conditions of the policy required payment to be made on or before the day the premium is due, added, and "members neglecting so to pay are carrying their own risks," and, as a postscript, "prompt payment is necessary to keep your policy in force." There was no statement that if payment was not made the policy would "become forfeited and void." *Held*, that the notice was not a compliance with the requirements of the statute and was insufficient to work a forfeiture. *Phelan v. N. W. M. L. Ins. Co.* 147
2. The only proof of service of the notice was that it was found among the papers of the deceased two days after his death and seventeen days after the premium became due. The residence of the deceased at the time notice should have been given was "No. 45 Warren street, New York." This was known to and appeared upon defendant's books. The notice was addressed to him at No. 37 Barclay street. *Held*, that it was not to be presumed that the notice was mailed on the day of its date or that the envelope was properly addressed, on the contrary, the presumption, in the absence of other evidence, was that the address

on the envelope corresponded to the address on the letter; nor was it to be presumed that the letter reached P. in due course of mail. *Id.*

INTEREST.

1. G. died, leaving an estate of over \$4,000,000. By his will he bequeathed to his son T. \$1,000,000 to be paid within eighteen months after the testator's death. There was no provision for the payment of interest on this sum, or for the support of the legatee until it was paid. T. was at the time about twenty-seven years of age, in delicate health, and had always been supported by his father; he was not, however, absolutely incompetent to transact any business, and was named as one of the executors. His fees as executor, had he qualified, would have been largely in excess of any sum he had annually drawn from his father while living. *Held*, that T. was not entitled to any interest on the legacy previous to the expiration of the time fixed for its payment. *Thorn v. Garner.* 198
2. The business carried on by the testator had been conducted under the name of G. & Co. The business was continued under the same name by W., brother of the legatee, and the acting executor. During the eighteen months between the death of the testator and the payment of the legacy, certain sums of money were paid to T., amounting to \$164,000, nominally by G. & Co., but which were, in fact, payments on account of the legacy. At the end of the eighteen months the balance of the legacy was credited to T. as payment in full. *Held*, that no interest was properly chargeable on such advances. *Id.*

— From what time legatee entitled to interest on legacy.
See *Van Rensselaer v. Van Rensselaer.* 207

JUDICIAL SALES.

1. Where, upon sale of real estate by an assignee in bankruptcy, the

notice and conditions of sale were attached together and signed by the parties, *held*, that they constituted a memorandum by which both were bound; and that prior negotiations and oral agreements were merged therein; also, that there was an implied warranty that the vendor had a good title, but that this warranty existed only so long as the contract remained executory, and as the terms of sale required a conveyance without warranty or personal covenant, but simply sufficient to pass whatever right the vendor had in the lands upon delivery of the deed, the covenant implied in the contract was discharged, and the grantor thereafter was only bound by whatever covenants there were in the deed. *Clark v. Post*. 17

2. The deed given by the assignee contained a recital of the various proceedings in bankruptcy which led to the appointment of the assignee of the commencement of a suit by him as such assignee against S., wife of the bankrupt, who held the legal title of the real estate in question, to have such title adjudged invalid, and a conveyance of the premises to him in consideration of the discontinuance of such suit, "and other good and valid considerations." *Held*, that this did not make a warranty, either express or by way of covenant, that the recitals were true, or permit a recovery as for a breach on proof that the narration was false, as it was not material to the contract contained in the deed or an inducement to it. *Id.*

3. In an action brought by the purchaser against the executors of the assignee to recover back the purchase money paid, the complaint alleged that at the time of the sale, before offering the premises, the assignee "stated that he had a good title to it," and could and would give a good title as against S.; that plaintiff bid off and paid for the property and accepted a deed thereof, relying upon that statement, and in consideration thereof, and upon the express understanding and condition that the assignee "would indemnify and

protect her against any interest in or title to said premises which might thereafter be legally established and enforced" by S.; that S. subsequently brought an action of ejectment against plaintiff and the assignee, and, under judgment therein in her favor, recovered possession. There was no averment that the assignee acted fraudulently or with intent to deceive. On the trial plaintiff asked a witness as to the statements made by the assignee at the time of the sale; this was objected to on the ground that whatever statements were made were merged in the written contract. The objection was overruled. *Held*, error. *Id.*

4. In an action to compel the specific performance of a contract on the part of defendant to purchase certain property situate in the county of New York, these facts appeared: C. died intestate in Indiana in 1845, seized of the premises. In 1850 one P., a creditor of C., obtained letters of administration of his goods, etc., from the Surrogate's Court of Richmond county. The petition upon which the letters were granted stated that C. "died possessed of personal property in the state of New York." Subsequently, and before letters were issued, the petitioner presented an affidavit showing the existence of assets in Richmond county. The letters recited that C. left assets unadministered in said county. P. subsequently made due application for authority to mortgage, lease or sell the real estate of C. for the payment of his debts, and in 1851 such authority having been granted, the premises in question were sold to plaintiff's testator A., who died in 1872. In 1886 the agreement in question was executed between his executors and defendant. Defendant objected to the title that the Surrogate's Court did not acquire jurisdiction to issue letters to P. as administrator of C., and that the proceedings instituted by P. for a sale of the real estate were defective and ineffectual to confer any title to the land. It was claimed, and it appeared, that the order to show cause why a sale should

not be had was made returnable one day later than the time limited by statute, which requires all persons interested to appear at a time and place specified, "not less than six weeks nor more than ten weeks from the time of making such order." (2 R. S. 107, § 5.) *Held*, that there was no substantial departure from the requirements of the statute; that if there was an irregularity it was not one which abridged the rights of anyone, and was not a jurisdictional defect. *O'Connor v. Huggins*. 511

JURISDICTION.

1. The Special Term of the Superior Court of the city of New York has power to suspend, by order, the operation of a judgment rendered by it in an equity case, or to relieve the defendant from the duty of immediate obedience pending an appeal to this court, where the appeal does not of itself relieve, and a mere order staying proceedings on the part of the plaintiff would not effect that purpose. *Genet v. Prest., etc., D. & H. C. Co.* 473

2. In an action upon a personal judgment of a Canada court the complaint alleged, as the ground of jurisdiction, that defendant appeared in the action. The answer denied this allegation and affirmatively alleged that the court had no jurisdiction to render the judgment, as defendant neither appeared in the action nor was served with process. Upon the trial plaintiff introduced the judgment record, which showed on its face that the service was made upon defendant at his residence within this state. *Held*, that the service was ineffectual to give the judgment validity here if defendant was not a citizen of Canada or domiciled within that jurisdiction; that defendant's place of residence is to be presumed his domicile, and nothing having been shown to rebut that presumption, the service was ineffectual and the judgment had

no validity here. *Shepard v. Wright*. 582

8. No rule of comity requires this court to give effect to a personal judgment rendered under a foreign law where, on the face of the record, it appears that jurisdiction of the person of the defendant was not obtained. *Id.*

— *When court has power to amend, on motion, clerk's minutes of trial and to substitute other minutes.*
See Jones v. M. N. Bank (Mem.) 629

LACHES.

Mere delay for a period, short of that prescribed by the statute of limitations, does not necessarily bar an action for specific performance of an agreement; to discontinue an action it must appear that changes have taken place and circumstances occurred, rendering it inequitable to enforce the performance. *Deen v. Milne*. 308

LEASE.

In an action to recover rent which had accrued under a lease of a certain pier in New York city, it was admitted that defendant had had the full benefit of the lease in the use of the pier and the collection of wharfage according to its terms. Defendant put his defense on the sole ground that the lease was not made after or in pursuance of any sale by public auction of the privilege conferred, as required by the statute (§ 37, chap. 338, Laws of 1870), which was conceded by the plaintiff. *Held*, that this constituted no defense; that defendant having had the full benefit of the contract, was estopped from questioning its validity. *Mayor, etc., v. Sonneborn*. 423

LEGACIES.

1. The will of P., executed in 1871, after various legacies which he

directed to be paid out of a certain fund, gave a legacy of \$10,000 to the testator's sister, E., the directions for the payment of which were as follows: "To be paid by my executors when it shall be convenient for them, without regard to the time fixed by law, out of the moneys derived from the sale of the Van Schaick farm, * * * or otherwise, as it shall seem best to them. It is further my will that this legacy shall be deemed subservient to all others." Following this was a gift of the residuary estate. The testator had, previous to the execution of the will, entered into a contract with agents for the sale of the farm mentioned, in city lots. He died in March, 1873. Previous to June, 1874, there had been paid over to the sole acting executor, or upon his order to the residuary legatee, over \$15,000 of proceeds "derived from the sale" of said lots, and said legatee received more than sufficient to pay the legacy to E. In an action against said executor and legatee for an accounting and to compel payment to E. of said legacy, *held*, that by the will the legacy was charged upon the land specified and the proceeds of the sale, which not only stood as security, but were to be deemed the primary fund from which such payment should be made; that when the residuary legatee took the land and its proceeds she took it *cum onere*, and having accepted the devise must discharge the obligation resting upon it; that the provision making the legacy "subservient to all others" did not include the residuary gift, but simply the general legacies; and that the "convenience" referred to respected the situation of the estate, not the choice or arbitrary will of the executor, and when all the other general legacies were paid, leaving a surplus of the general fund intact for the residuary legatee, and there remained sufficient from the farm sales to pay the legacy to E., it became due and payable, and both the executor, who had misappropriated the money and the residuary legatee who had wrongfully accepted it, became liable for its payment, although there re-

mained unsold of the farm lands sufficient to pay the legacy. *Van Rensselaer v. Van Rensselaer.* 207

2. Also, *held*, that plaintiff was entitled to interest from the time when sufficient of the proceeds of the farm sales had been realized to pay her legacy. *Id.*
3. The rule of the common law that a legacy or devise, given with or without words of limitation, lapses in case of the death of the devisee or legatee before the testator, in the absence of express words to prevent a lapse, or of something in the context of the will indicating a contrary intent, is still in force in this state, save so far as modified by the Revised Statutes (3 R. S., 66, § 52) *i. e.*, where the devise or bequest is to a child or descendant of the testator. *In re Wells.* 396
4. T. deposited certain moneys in a bank and in a trust company to the credit of his daughter C. The first deposit was made in her presence and for her personal use. The deposits were entered in a pass-book which was delivered by T. to C. The latter drew out the deposits in bank and deposited them in the trust company, where they were included in the account with the deposit then made by T. T. left a will, executed after all of the deposits, except one small one, were made, by which various legacies were given to C. *Held*, that there was no ademption of the legacies by the gift of the moneys deposited, nor were they adempted *pro tanto* by the deposit made after the execution of the will. *In re Crawford.* 560

—When void or lapsed legacy goes into residuary estate and passes to residuary legatee.

See Riker v. Cornwell.

115

See WILLS.

LIMITATION OF ACTIONS.

1. Plaintiff brought this action, in 1881, to recover a specific portion of certain insurance money col-

lected by E., defendant's testator, in 1872, of which portion plaintiff claimed he was the equitable owner. *Held*, that the alleged cause of action was a liability implied by law which arose when the money was received by E.; that it was subject to the six-years statute of limitations then in force (Code Pro. § 91), and so was barred. *Roberts v. Ely.* 128

2. *It seems* that if an equitable action could have, and had been brought to enforce the alleged liability, it would still have been subject to the legal limitation of six years. *Id.*

3. As against a promissory note, payable on demand with interest, the statute of limitations begins to run at its date. *Mills v. Davis.* 243

4. *It seems* the provision of the Code of Civil Procedure (§ 805), declaring that, in order to take a case out of the statute of limitations, an acknowledgment or promise to pay in writing, signed by the party to be charged, is necessary, but that this "does not alter the effect of a payment of principal or interest;" does not change the nature or effect of a part payment. The old rule is recognized and continued and the payment may be proved by oral evidence. *Id.*

5. In order to make an indorsement upon a promissory note of part payment made by the holder, without the privity of the maker, competent as evidence to meet the defense of the statute of limitations, it must appear that it was made at the time when its operation would be against the interest of the party making it; and so, at least, that it was made before the statute could have operated. *Id.*

6. *It seems* that even then it is a question for the jury as to whether the payment was, in fact, made. *Id.*

7. Upon a reference under the statute of a claim by an executor against the estate of a deceased person, which claim was founded upon a promissory note, the defense was the statute of limitations. The

note bore indorsements of payment of interest made by plaintiff. Plaintiff himself and two other witnesses who were entitled under the will each to one-third of whatever was collected on the note, were permitted to testify, under objection and exception, that the indorsements were made by plaintiff during the lifetime of plaintiff's testator. *Held*, that the testimony was incompetent under the Code of Civil Procedure (§ 829). *Id.*

8. E., plaintiff's decedent, was the owner at the time of her death, which occurred in 1878, of a promissory note executed by H., her husband, defendant's intestate, which, by its terms, fell due in May, 1878. E. left a will, by which she bequeathed the note to certain persons named. H. proposed to the legatees that in case payment was not required, he would upon his death will all his property to them. The note was thereupon surrendered to him; he died intestate in 1883. The will of E. was thereafter probated and letters of administration, with the will annexed, issued to plaintiff. On reference under the statute of a claim based upon the note, *held*, that if there was a valid agreement between H. and those to whom the note was bequeathed, then his estate was not liable upon the note, but only for a breach of the contract agreement, which cause of action belonged to the legatees, not to plaintiff; if the agreement was invalid, then H. remained liable on the note simply, and the statute of limitations was a bar; that the defendant was not estopped by the agreement from setting up the bar of the statute, as plaintiff represented none of the parties and was an entire stranger thereto. *Myers v. Cronk.* 608

9. In an action for an accounting as to moneys alleged to have been placed in the hands of S., defendant's testator, by plaintiff for investment, the only evidence presented was a letter from S. to plaintiff, which, after acknowledging the receipt of the money and that it was drawing interest at seven per cent, continued as follows:

"If I can find an opportunity of purchasing a mortgage * * * whereby I can, without risk, secure a greater profit, I shall do so unless you wish to make any other use of the money; should you desire to use it, please let me know." *Held*, that the relation of plaintiff to the decedent was that of a creditor upon a simple contract, not that of a beneficiary under a trust; that the amount was payable at once and the statute of limitations then began to run, and after the lapse of six years was a bar to the action. *Budd v. Walker.* 637

MANUFACTURING CORPORATIONS.

A corporation formed under the act of 1868 (Chap. 842, Laws of 1868), entitled "An act to provide for the transmission of letters, packages and merchandise in the cities of New York and Brooklyn * * * by means of pneumatic tubes to be constructed beneath the surface," etc., is a manufacturing corporation with powers limited to the accomplishment of the purposes so declared. *Astor v. N. Y. Arcade R. Co.* 93

MARRIED WOMEN.

— *Provision of married women's act* (§ 2, Chap. 375, Laws of 1849), providing that trustee holding property for a married woman may convey same to her on certain conditions, applies, only to nominal trusts, whose sole object is to secure her in an enjoyment of her separate estate.

See Genet v. Hunt. 158

MASTER AND SERVANT.

1. S., plaintiff's intestate, was in defendant's employ as a brakeman upon a freight train. A car loaded with lumber at a way station was to be attached to the train. It was being moved by the engine from the switch to the main track. S.

got upon it to stop it, but in consequence of the improper manner in which the car was loaded the brake was rendered useless, a collision occurred and S. was thrown from the car and killed. In an action to recover damages, it appeared that the car and its appliances before it was loaded were in good condition. It was, by defendant's rules, made the duty of the station-master to either inspect the car himself or have some one do so before it was taken out. Had this been done the improper loading would have been discovered. *Held*, that defendant, having provided a safe car and a system and competent men for its inspection, for injuries resulting to a co-employee, for their neglect of this duty, it was not liable. *Byrnes v. N. Y., L. E. & W. R. R. Co.* 251

2. Also, *held*, the question was not affected by the fact that the car was loaded by the owner of the lumber. *Id.*

3. The simple fact that a machine is dangerous does not make an employer liable for an injury received by a minor employed in operating it. *Buckley v. G. P. & R. M. Co.* 540

4. Where the minor is familiar with the machine, and its character and operation are obvious, and he is aware of and fully appreciates the danger to be apprehended from working it, he takes upon himself the risks incident to the employment the same as a person of mature age. *Id.*

5. Plaintiff, a boy about twelve years of age, was employed in helping to operate a machine in defendant's factory. He had been in such employ about three days when, in attempting to put a cylinder in place, his foot slipped, he threw out his hand to save himself from falling and thrust it into the cogs of some revolving wheels about nine inches from the end of the cylinder, and the hand was crushed. *Held*, that an action to recover damages for the injury was not maintainable; that as the danger was apparent, and as the injury was occasioned

solely by the accidental slipping, the fact that plaintiff had not been warned as to such danger was immaterial. *Id.*

MERGER.

1. Where, upon sale of real estate by an assignee in bankruptcy, the notice and conditions of sale were attached together and signed by the parties, *held*, that they constituted a memorandum by which both were bound; and that prior negotiations and oral agreements were merged therein; also, that there was an implied warranty that the vendor had a good title, but that this warranty existed only so long as the contract remained executory, and as the terms of sale required a conveyance without warranty or personal covenant, but simply sufficient to pass whatever right the vendor had in the lands upon delivery of the deed, the covenant implied in the contract was discharged, and the grantor thereafter was only bound by whatever covenants there were in the deed. *Clark v. Post.* 17

2. In an action brought by the purchaser against the executors of the assignee to recover back the purchase-money paid, the complaint alleged that at the time of the sale, before offering the premises, the assignee "stated that he had a good title to it," and could and would give a good title as against S.; that plaintiff bid off and paid for the property and accepted a deed thereof, relying upon that statement, and in consideration thereof, and upon the express understanding and condition that the assignee "would indemnify and protect her against any interest in or title to said premises which might thereafter be legally established and enforced" by S.; that S. subsequently brought an action of ejectment against plaintiff and the assignee, and, under judgment therein in her favor, recovered possession. There was no averment that the assignee acted fraudulently or with intent to deceive. On the trial plaintiff asked a witness as to the statements made by

the assignee at the time of the sale; this was objected to, on the ground that whatever statements were made were merged in the written contract. The objection was overruled. *Held*, error. *Id.*

3. In equity the union of legal and equitable estates in the same person does not effect a merger unless such was the intention of the parties and justice and equity require it. *Asche v. Asche.* 232
4. Merger is accomplished in law when two or more estates in the same property unite in the same person, and when these estates comprise the whole legal and equitable interest in such property, and so the holder becomes the absolute owner; it cannot take place where there is an intermediate estate. *Id.*
5. The provisions of the Revised Statutes (1 R. S. 727, § 471), indicating the circumstances under which the union of legal and equitable estates extinguish the latter, are, in principle, equally applicable to trusts of personal property. *Id.*

MISTAKE.

In proceedings to compel a purchaser at a partition sale to complete his purchase, it appeared that R. formerly owned an undivided seven-tenths of the land in question; he conveyed two-tenths, and thereafter executed a deed which purported to convey his remaining interest, and under this deed the parties claimed title to one-half. It appeared, however, that the intent was to convey but two-tenths. *Held*, that, as the deed was liable to be reformed as against all the parties, it was to be assumed that the reformation might occur, and, therefore, in this respect the title was defective. *Scholle v. Scholle.* 261

MONEY HAD AND RECEIVED.

1. Money in the hands of one person, to which another is equitably

entitled, may be recovered by the latter in a common-law action for money had and received, subject to the restriction that the mode of trial and the relief which can be given in a legal action is adapted to the exigencies of the case and is capable of adjustment in such an action without prejudice to the interests of other parties. *Roberts v. Ely.* 128

2. No privity of contract is required to sustain such an action, except that which results from the circumstances, and it is immaterial whether defendant's original possession was rightful or wrongful. *Id.*
3. The fact that the relation between the parties has a trust character does not, *ipso facto*, in all cases, exclude the jurisdiction of a court of law. *Id.*

MORTGAGE.

1. A purchaser of mortgaged premises, while technically he takes the fee, acquires simply the equity of redemption, and payment by him of the mortgage is a purchase of the interest carved out by the mortgage as a lien, and in equity he holds the fee under the mortgagee as to that interest, and under his grantor as the equity of redemption. *Everson v. McMullen.* 293
2. Where, therefore, the purchaser of the equity of redemption, who is under no personal liability to pay the mortgage debt, pays it in aid of his own title, or procures its discharge by giving his own mortgage upon the premises in lieu thereof, as against the widow of his grantor who joined with her husband in the mortgage, but not in the deed, said grantee is entitled to the protection of the mortgagee's right as against the dower which is covered and charged by the mortgage. The purchaser takes his land charged as surety for the mortgage debt, and having paid it, has the right, as against the mortgagors, to be subrogated to the position of the mortgagee and to stand in equity as the purchaser

and holder of his security, and the widow seeking to enforce in equity her right of dower is bound to allow her due proportion of the mortgage debt. *Id.*

See FORECLOSURE.

MOTIONS AND ORDERS.

1. The Special Term of the Superior Court of the City of New York has power to suspend, by order, the operation of a judgment rendered by it in an equity case, or to relieve the defendant from the duty of immediate obedience pending an appeal to this court, where the appeal does not of itself relieve, and a mere order staying proceedings on the part of plaintiff would not effect that purpose. *Genet v. Prest., etc., D. & H. C. Co.* 472
2. In an action to dissolve a law firm, determine its assets and procure a sale of them and a settlement of the partnership affairs, the complaint alleged that certain abstracts of title to real estate in New York and New Jersey were part of the assets. The answer denied the ownership by the firm of said abstracts. An order was made, under objection by defendants, appointing a receiver *pendente lite* and directing him to take possession, among other things, of the abstracts of title in possession of said firm, and, within fifteen days after his qualification, to expose to sale, and sell, the same, although no special or immediate necessity for their sale was shown by the papers. *Held*, error, as by this order the court determined a material issue upon affidavits in anticipation of the trial and the determination of the issues joined, that the abstracts ought to remain in possession of the receiver, free of access to all parties, until the trial and ultimate determination of the rights of the respective parties. *Brush v. Jay.* 482

— *When court has power to amend on motion clerk's minutes of trial and to substitute other minutes.*

See Jones v. M. N. Bank (Mem.)

MUNICIPAL CORPORATIONS.

1. A city as well as an individual, may obtain title by adverse possession. *Mayor, etc., v. Carleton.* 285
2. Where a municipal corporation, without the pretense of authority and in direct violation of a statute, assumes to grant to a private individual the right to obstruct one of its streets while in the transaction of his private business, and for such privilege takes compensation, it must be regarded as itself maintaining a nuisance so long as the obstruction is continued by reason of and under the license, and it is liable to damages naturally resulting therefrom to a third person. *Cohen v. Mayor, etc.* 532

MURDER.

It is not sufficient to excuse a person from the consequences of a fatal assault upon another, that he was provoked thereto by an angry controversy of words alone, however aggravating, and when the parties are unequal in strength, and the assaulting party being the stronger and having no reason to apprehend physical injury from the other, uses a dangerous weapon, the question whether it was used with homicidal intent is one of fact for the jury. *People v. Kelly.* 647

NEGLIGENCE.

1. S., plaintiff's intestate, was in defendant's employ as a brakeman upon a freight train. A car loaded with lumber at a way station was to be attached to the train. It was being moved by the engine from the switch to the main track. S. got upon it to stop it, but in consequence of the improper manner in which the car was loaded the brake was rendered useless, a collision occurred and S. was thrown from the car and killed. In an action to recover damages, it appeared that the car and its appliances before it was loaded were in good condition. It was, by defend-

ant's rules, made the duty of the station-master to either inspect the car himself or have some one do so before it was taken out. Had this been done the improper loading would have been discovered. *Held*, that defendant, having provided a safe car and a system and competent men for its inspection, for injuries resulting to a co-employee, for their neglect of this duty, it was not liable. *Byrnes v. N. Y., L. E. & W. R. R. Co.* 251

2. Also, *held*, the question was not affected by the fact that the car was loaded by the owner of the lumber. *Id.*
3. Also, *held*, that the question was sufficiently raised by a motion for a nonsuit based on the ground that no negligence of the defendant had been shown. *Id.*
4. The duty of active vigilance required of persons going upon railroad tracks must be adapted to the circumstances of the case, and when the company, by its own conduct and its published regulations, has led the public to believe trains will not be run upon its tracks at specified times and places, persons having occasion to cross them have the right to rely upon these assurances, and are not necessarily guilty of negligence when injured by prohibited trains while doing so. *Parsons v. N. Y. C. & H. R. R. R. Co.* 855

5. In an action to recover damages for alleged negligence causing the death of M., plaintiff's testator, these facts appeared: M. was a passenger on one of defendant's trains going north; he got out at a way-station on the west side of the track, walked quite rapidly to the north a short distance by the side of the train, and then, in attempting to cross a track to the west, was struck and killed by a freight engine which was moving rapidly backward. When he saw the engine he attempted to jump from the track, but failed to escape. The accident occurred within the station-yard upon grounds where passengers were accustomed to pass and repass in go-

- ing to and from trains. Defendant's rules require freight trains to approach stations slowly and to stop before reaching a station, at which a passenger train is landing or receiving passengers. The freight train was visible from the station at the distance of about three hundred feet, but was partially concealed from view by a curve in the road and by trusses on a bridge which it crossed before reaching the station, and about twenty feet south of which the decedent was killed. No one saw the engine approaching until it got upon the bridge. The freight train was moving about forty feet a second; not more than ten seconds elapsed between the time M. alighted and when he was struck. During this time the engine of the passenger train was blowing off steam, making a loud noise. *Held*, that the case was properly submitted to the jury and the evidence justified a verdict for plaintiff; that M., having once looked when he alighted and seeing no train, had a right to assume none would be coming at such a rate of speed as would preclude him from crossing the track; also, that it was immaterial whether M. when he alighted ceased to be a passenger or not. *Id.*
6. Defendant claimed and gave evidence tending to show that the engineer in charge of the freight engine attempted to stop the train on approaching the station, by reversing the lever and shutting off steam, but was temporarily disabled from controlling it by a blow received from the lever, which slipped from its position after being reversed, and struck him. Expert testimony was given, tending to show that such an accident could not occur if the lever was properly reversed except from a defective appliance. *Held*, that the fact that the engineer was thus disabled did not excuse defendant from the charge of negligence. *Id.*
7. *It seems* a passenger on a railroad train does not lose his character as such by alighting at a regular station, although he has not yet arrived at the terminus of his journey. *Id.*
8. In an action to recover damages for alleged negligence causing the death of B., plaintiff's intestate, it appeared that defendants, S. & D., were the owners of certain premises in the city of B. occupied by defendant B. as their tenant. There was a store upon the premises, the rear of which was three feet from the line of an alley. Between the store and the alley was an open area eight feet deep. The buildings on each side of the store extended to the alley. The wall of the area adjoining the alley was faced with a stone coping seven inches above the alley and two feet wide, all of which was upon defendants' premises. The alley was closed at one end and was used only by persons having business with the rear of buildings facing thereon, and almost exclusively in the daytime. It had no sidewalks and was always incumbered with barrels, boxes and rubbish. M. was employed as a watchman, his duty being to pass through the alley hourly during the night and examine the windows and doors of certain buildings abutting thereon. M. was found in the area where he had fallen during the night, and died from the injuries received. He had been on duty in the alley for thirteen nights previous to the one on which the accident happened; on that night the alley was not lighted. *Held*, that a refusal to nonsuit was error; that the facts did not warrant an inference that the area was a nuisance; and that the evidence was insufficient to show or to justify an inference of the exercise of ordinary care and prudence on the part of decedent. *Bond v. Smith.* 378
9. The simple fact that a machine is dangerous does not make an employer liable for an injury received by a minor employed in operating it. *Buckley v. G. P. & R. M. Co.* 540
10. Where the minor is familiar with the machine, and its character and operation are obvious, and he is aware of and fully appreciates the

danger to be apprehended from working it, he takes upon himself the risks incident to the employment the same as a person of mature age. *Id.*

11. Plaintiff, a boy about twelve years of age, was employed in helping to operate a machine in defendant's factory. He had been in such employ about three days when, in attempting to put a cylinder in place, his foot slipped, he threw out his hand to save himself from falling and thrust it into the cogs of some revolving wheels about nine inches from the end of the cylinder, and the hand was crushed. *Held*, that an action to recover damages for the injury was not maintainable; that as the danger was apparent, and as the injury was occasioned solely by the accidental slipping, the fact that plaintiff had not been warned as to such danger was immaterial. *Id.*

12. The neglect of the employes of a railroad company to ring the bell or blow the whistle of an engine approaching a crossing does not excuse a traveler on the highway from exercising care on his part, in looking and listening before crossing the railroad tracks in order to escape the danger of moving trains. *Oullen v. Pres't, etc., D. and H. C. Co.* 667

body awarding the contract, acting in good faith, may refuse to award it to him if they deem it for the best interest of the city to do so, and they may reject all the bids and readvertise. *Walsh v. Mayor, etc.* 142

2. In June, 1881, the department of docks of the city of New York advertised for proposals for work in building a pier and repairing other piers. The advertisement contained a notice to bidders that "the right to decline all estimates is reserved if deemed for the interest of the corporation." Three proposals were received for building the pier and two for repairing the others. Upon opening the bids it appeared that the bidders, other than plaintiff, proposed to do the work for sums which aggregated for both jobs \$14,500 less than plaintiff's bid, but their bids were not accompanied by checks as provided by the city ordinance. All of the bids were rejected, the work was readvertised and contracts for the work awarded to the lowest bidders under such readvertisement. Their bids were much less in the aggregate than plaintiff's original bid. Plaintiff brought this action to recover damages for a refusal to accept his bid under the first advertisement. *Held*, that the action was not maintainable. *Id.*

3. The Y. M. C. Association of the city of New York, incorporated under the act of 1866 (Chap. 350, Laws of 1866), is not a seminary of learning within the meaning of the statutory provision exempting from taxation buildings erected for the use of, and used by such institutions. (1. R. S. 388, § 4, sub. 3, as amended by chap. 397, Laws of 1883.) *Y. M. C. A. v. Mayor, etc.* 187

4. Said association erected on lots owned by it on the Bowery a building, the basement of which contained a gymnasium, bowling alley and bath-room; above were twenty-two rooms, one of which only was devoted to purposes of public worship, and that was used

NEW YORK (CITY OF).

1. The provision of the act of 1861 (Chap. 308, Laws of 1861), in relation to contracts by the city of New York, requiring that all contracts "shall be awarded to the lowest bidder for the same with adequate security, and every such contract shall be deemed confirmed in and to such lowest bidder at the time of the opening of the bids, estimates or proposals therefor, and such contract shall be forthwith duly executed * * * with such lowest bidder," does not compel the making of a contract by the city with such lowest bidder. While no contract can be let to other than the lowest bidder, the

also as a lecture hall. In an action to cancel a tax levied upon said premises, *held*, that they were not exempted from taxation under the general act (*supra*) exempting "every building for public worship" as the same is modified in its application to the city of New York by the "Consolidation Act" (§ 827, chap. 410, Laws of 1882), as it was not exclusively used for such purpose; and, in the absence of any special act exempting it, that the property was liable to taxation.

Id.

5. In an action of ejectment these facts appeared: Pursuant to an application on behalf of plaintiff an act was passed in 1839 (Chap. 246, Laws of 1839), authorizing it to acquire title by condemnation proceedings to land of which that in question is a part. Commissioners of estimate and assessment, purporting to have been appointed in proceedings under the act, made reports therein which were confirmed by the Supreme Court. The city paid the amounts awarded to the owners and immediately took possession of the lands. Pursuant to resolution of the common council a market was erected thereon. In 1842 that body, by resolution, directed a sale of all the other buildings on the land except the market-house. In 1843 a substantial fence was built by the city, inclosing all the land, and thereafter, for about twenty years, it leased the market-house. It also, in 1847 and 1849, erected engine-houses on the land. The land remained so inclosed and occupied until 1860, when, pursuant to resolutions of the common council, the buildings were removed, and in 1863 it was thrown open to the public as a park, and was so used down to 1866 or 1867, during all of which time there was a substantial fence around it. In 1867 the land was put up for sale in lots at auction by the commissioners of the sinking fund. The purchasers of some of the lots took title and erected buildings thereon, other purchasers refused to take title and litigations resulted; the lots bid off by them, for five or six years thereafter, were neglected,

the fences decayed and the lots were left open to intruders. Defendant and others went into possession of the premises in question in 1873 as mere intruders; he took several deeds from the others; the possession of none of them ante-dated 1873. In 1871 a committee of the commissioners of the sinking fund, charged with the duty of estimating the value of the real estate belonging to the city, included said premises in their report. This action was commenced in 1878. *Held*, that, without regard to the validity of the condemnation proceedings, as against defendant the city's prior possession authorized a recovery; that there was no such abandonment by it as lost to it the benefit of such prior possession; also, that it had acquired title by adverse possession. *Mayor, etc., v. Carleton.*

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6. The act of 1873 (Chap. 647, Laws of 1873), requiring the B. S. & F. F. R. R. Co., a street railroad corporation organized under the General Railroad Act (Chap. 140, Laws of 1850), to pay into the treasury of the city of New York one per cent of the gross receipts instead of a license fee as before prescribed (Chap. 199, Laws of 1873), is constitutional; it must be deemed an alteration and amendment of the charter of the company, and so is within the power reserved to the legislature by the general act, the provisions of the Revised Statutes to which corporations organized under said act are by its terms made subject and the state Constitution. (Art. 8, § 1.) *Mayor, etc., v. Twenty-third St. R. Co.* 311
7. While under the power so reserved the legislature cannot deprive a corporation of its property or annul its contracts with third persons, it may take away its franchise to be a corporation, or prescribe the conditions and terms upon which it may live and exercise such franchise. *Id.*
8. The said company leased its property rights, privileges and franchises to the defendant. There was nothing in the lease imposing upon the lessee the obligation to

- pay the percentage. In an action to compel such payment, *held*, that, while no such obligation was imposed by the acts authorizing said company to lease its road (Chap. 199, Laws of 1873; chap. 389, Laws of 1875) or by any statute, defendant upon taking the place of its lessor, as to its charter rights and power, took its place also, as to its charter obligation and duties, and was not entitled to exercise the former without discharging the latter; and that, therefore, the action was maintainable. *Id.*
9. A contract between M., plaintiff's assignor and defendant, for grading and flagging one of its streets, permitted a change of the grade indicated upon the plan and profile of the work without additional compensation. Through the erroneous action of defendant's engineer, not from any intentional change of plan, more work was required of the contractor and additional expense was incurred by him than would have been necessary under the contract. *Held*, that plaintiff was entitled to recover for the additional labor and expense according to its value and amount; that she was not confined to the rate of compensation provided in the contract for similar work. *Mulholland v. Mayor, etc.* 681
10. Plaintiff was, in 1879, employed by the commissioners of excise of the city of New York as an inspector of excise. On December 16, 1880, he received notice that he had been, by resolution of the excise board, "suspended without pay," and after that time he was not allowed to render any services. He frequently attended at the office of the excise board and offered to discharge the duties of inspector. He never received any notice of dismissal. In an action to recover salary claimed to be due it was conceded that the board of excise commissioners had power to remove their employees, and defendant claimed that the power to suspend was included therein. *Held*, untenable; that there is nothing in the power to remove or expel which necessarily and in all cases includes the power to sus-
- pend, and the latter power may not be implied from the mere grant of the former; that while there might be cases where such an inference might be drawn from the general scope and nature of the act granting the power, there was nothing in this case justifying it. *Gregory v. Mayor, etc.* 416
11. Also, *held*, that the tenders of performance made by G. were sufficient. *Id.*
12. In an action to recover rent which had accrued under a lease of a certain pier in New York city, it was admitted that the defendant had had the full benefit of the lease in the use of the pier and the collection of wharfage according to its terms. Defendant put his defense on the sole ground that the lease was not made after or in pursuance of any sale by public auction of the privilege conferred, as required by the statute (§ 37, chap. 383, Laws of 1870), which was conceded by the plaintiff. *Held*, that this constituted no defense; that defendant having had the full benefit of the contract, was estopped from questioning its validity. *Mayor etc., v. Sonneborn.* 423
13. M., a grocer doing business in the city of New York, was in the habit of keeping his grocery wagon, when not in use, standing day and night in the street in front of his store under a permit to do so, granted to him by the city, for which an annual license fee was paid. When so standing the thills were raised perpendicularly and held up by strings. A passing ice wagon struck the grocery wagon and turned it partially around, the strings holding up the thills gave way and they came down upon the sidewalk striking plaintiff's intestate, who was passing thereon, causing his death. In an action to recover damages, *held*, that the license was issued without authority (§ 86, sub. 4, chap. 410, Laws of 1882); that the storing of the wagon in the highway was a public nuisance; that defendant by licensing it made itself liable for any damages resulting therefrom, the

same as if it had itself maintained the nuisance; and that, as the accident happened because of the presence of the obstruction, it was the proximate cause of the injury. *Cohen v. Mayor, etc.* 583

NOTICE.

1. Defendant, a foreign insurance company, doing business in this state, issued a policy to P., plaintiff's intestate. Before a payment of premium became due it sent to P. a notice; in attempted compliance with one of the conditions of forfeiture for non-payment of premiums imposed by the act of 1877, (Chap. 821, Laws of 1877), i. e., that "a notice stating when the premium will fall due, and that if not paid the policy * * * will become forfeited and void" must "be duly addressed and mailed to the person whose life is assured, at his last known post-office address, postage paid," at least thirty and not more than sixty days before the premium is payable. The notice, after stating the amount of the premium and the time when it would fall due, where it was to be paid, and that the conditions of the policy required payment to be made on or before the day the premium is due, added, "and members neglecting so to pay are carrying their own risks," and, as a postscript, "prompt payment is necessary to keep your policy in force." There was no statement that if payment was not made the policy would "become forfeited and void." *Held*, that the notice was not a compliance with the requirements of the statute and was insufficient to work a forfeiture. *Phelan v. N. W. M. L. Ins. Co.* 147

2. The only proof of service of the notice was that it was found among the papers of the deceased two days after his death and seventeen days after the premium became due. The residence of the deceased at the time notice should have been given was "No. 45 Warren street, New York." This was known to and appeared upon

defendant's books. The notice was addressed to him at No. 37 Barclay street. *Held*, that it was not to be presumed that the notice was mailed on the day of its date or that the envelope was properly addressed, on the contrary, the presumption, in the absence of other evidence, was that the address on the envelope corresponded to the address on the letter; nor was it to be presumed that the letter reached P. in due course of mail. *Id.*

NUISANCE.

1. In an action to recover damages for alleged negligence causing the death of B., plaintiff's intestate, it appeared that defendants, S. & D., were the owners of certain premises in the city of B., occupied by defendant B. as their tenant. There was a store upon the premises, the rear of which was three feet from the line of an alley. Between the store and the alley was an open area eight feet deep. The buildings on each side of the store extended to the alley. The wall of the area adjoining the alley was faced with a stone coping seven inches above the alley and two feet wide, all of which was on defendant's premises. The alley was closed at one end and was used only by persons having business with the rear of buildings facing thereon, and almost exclusively in the daytime. It had no sidewalks and was always incumbered with barrels, boxes and rubbish. M. was employed as a watchman, his duty being to pass through the alley hourly during the night, and examine the windows and doors of certain buildings abutting thereon. M. was found in the area, where he had fallen during the night, and died from the injuries received. He had been on duty in the alley for thirteen nights previous to the one on which the accident happened; on that night the alley was not lighted. *Held*, that a refusal to nonsuit was error; that the facts did not warrant an inference that the area was a nuisance. *Bond v. Smith* 878

2. Where a municipal corporation, without the pretense of authority and in direct violation of a statute, assumes to grant to a private individual the right to obstruct one of its streets while in the transaction of his private business, and for such privilege takes compensation, it must be regarded as itself maintaining a nuisance so long as the obstruction is continued by reason of and under the license, and it is liable to damages naturally resulting therefrom to a third person. *Cohen v. Mayor, etc.* 532

3 M., a grocer, doing business in the city of New York, was in the habit of keeping his grocery wagon when not in use, standing day and night in the street in front of his store under a permit to do so, granted to him by the city, for which an annual license fee was paid. When so standing the thills were raised perpendicularly and held up by strings. A passing ice wagon struck the grocery wagon and turned it partially around, the strings holding up the thills gave way and they came down upon the sidewalk striking plaintiff's intestate, who was passing thereon, causing his death. In an action to recover damages, *held*, that the license was issued without authority (§ 86, sub. 4, chap. 410, Laws of 1882); that the storing of the wagon in the highway was a public nuisance; that defendant by licensing it made itself liable for any damages resulting therefrom, the same as if it had itself maintained the nuisance; and that as the accident happened because of the presence of the obstruction, it was the proximate cause of the injury. *Id.*

OFFICE AND OFFICERS.

1. Plaintiff was, in 1879, employed by the commissioners of excise of the city of New York as an inspector of excise. On December 16, 1880, he received notice that he had been, by resolution of the excise board, "suspended without pay," and after that time he was

not allowed to render any services. He frequently attended at the office of the excise board and offered to discharge the duties of inspector. He never received any notice of dismissal. In an action to recover salary claimed to be due it was conceded that the board of excise commissioners had power to remove their employes, and defendant claimed that the power to suspend was included therein. *Held*, untenable; that there is nothing in the power to remove or expel which necessarily and in all cases includes the power to suspend, and the latter power may not be implied from the mere grant of the former; that while there might be cases where such an inference might be drawn from the general scope and nature of the act granting the power, there was nothing in this case justifying it. *Gregory v. Mayor, etc.* 416

2. Also, *held*, that the tenders of performance made by G. were sufficient. *Id.*

PARTIES.

1. In an action by an executor to recover damages for the alleged conversion of certain promissory notes, it was conceded that the notes, before the death of plaintiff's testatrix belonged to her, and that thereafter defendant had possession of them. The issue was as to whether she gave them to him or whether he wrongfully became possessed thereof. Plaintiff, as a witness in his own behalf, testified that a few hours before the death of decedent, when she was in an unconscious state, which continued until her death, he saw the notes in her trunk; that just after her death he looked again and they were gone, and that defendant was in the house and had an opportunity to take them. Defendant, as a witness in his own behalf, was permitted to testify that he had possession of the notes a week before the death of deceased, and that they were in his possession when the executor testified he saw them in the trunk; he was then asked: "Did you take them (the notes) from any person

without their consent?" This was objected to as incompetent, under the Code of Civil Procedure (§ 829), and was excluded. *Held*, that if the ruling was erroneous, as the testimony was only proper in rebuttal, not to establish an affirmative defense, and as defendant, if believed, had already thoroughly and perfectly rebutted plaintiff's evidence, the error did not justify a reversal. *Lewis v. Merritt*. 386

2. *It seems* that plaintiff's testimony tended to establish that there had been no personal transaction between deceased and defendant by which his possession could have been rightful, and it was thereby made competent for defendant to testify that he took the notes with her consent, and so rightfully. *Id.*

3. In an action against sureties for the tenants upon a lease of certain hotel property, brought by McD., the landlord, but continued after his decease by his executors, the defense was that defendants were induced to become sureties by reason of certain false and fraudulent representations made by decedent to them. On the trial defendants proved that when the tenants came to defendant W. and asked him to become a surety, he requested them to go to McD. and make certain inquiries as to the business done at the hotel, so that he might judge as to the propriety of his consenting to become a surety; that they went with another of the sureties and a third person and that McD. made to them the representations set forth in the answer. Defendant W. and one of the tenants were then called as witnesses for the defense and were asked as to what was said to W. on the tenant's return from the interview with McD. This was objected to and excluded as incompetent under the Code of Civil Procedure (§ 829). *Held*, error; that conceding the testimony was incompetent to prove what representations were, in fact, made by McD., as defendants were bound to prove, in addition to this, that the representations were communicated to them and that they were thereby induced to become sureties,

having proved by a competent witness what representations were made, it was competent to prove by the witnesses called that they were communicated to W.; that this was not a personal conversation with deceased. *Hill v. Woolsey*. 391

4. The will of C. directed that \$100,000 should be invested and the income thereof paid to his wife during her life; upon her death the principal to be paid to H., the testator's adopted son, if he shall then have arrived at the age of twenty-eight years; if not, it was to be kept invested and the income applied to his use until he arrived at the age of twenty-eight, and then the principal, with any accumulations of income, to be paid to him. In case of his death before arriving at that age, without leaving lawful issue, the will directed that said principal should be divided among certain beneficiaries named; if he left lawful issue, then said sum was directed to be paid to such issue. The residuary clause of the will provided as follows: "All the rest, residue and remainder of my estate, real and personal, whosoever and whatsoever, and such as I shall hereafter acquire, I do give, devise and bequeath to my adopted son, * * * to be paid over to him when he shall have arrived at the age of twenty-eight years." Following this were provisions disposing of the residuum in case of the death of H. before reaching the age of twenty-eight. C. died, leaving his widow and H. surviving him. H died after reaching the age of twenty-eight; the widow survived him. On an application of the executors of C. for a settlement of their accounts, certain of the latter's next of kin appeared and filed objections thereto, which were overruled on the ground that they were not interested in the estate. *Held*, no error; that H. took a vested interest in remainder in the \$100,000, if not by virtue of the clause setting it apart, at least under the residuary clause. *In re Crossman*. 503

5. On trial of an action to recover

an alleged loan, plaintiffs gave in evidence a check signed by their intestate, payable to defendant, and proved that it was delivered to, indorsed by and paid to him; they then called him as a witness and proved by him that at the time of the delivery of the check said intestate did not owe him anything. As a witness in his own behalf he was asked to state what took place between decedent and himself. This was objected to and excluded as incompetent under the provision of the Code of Civil Procedure (§ 829), excluding the testimony of a party against an executor, etc., in relation to a personal transaction with the decedent. *Held*, error; that said provision did not abrogate the rule of evidence, that where a party calls a witness and examines him as to part of a communication or transaction, the other party may call out the whole, so far as it bears upon or tends to explain the part called out; that, as the testimony of defendant called out by plaintiff tended to rebut the presumption that the transaction, *i. e.*, the giving of the check, was the payment of a debt, and to raise the presumption that it was a loan, this opened the whole transaction and entitled defendant to testify in his own behalf in regard thereto. *Nuy v. Curley*.

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PARTITION.

1. In proceedings to compel a purchaser at a partition sale to complete his purchase, it appeared that R. formerly owned an undivided seven-tenths of the land in question; he conveyed two-tenths, and thereafter executed a deed which purported to convey his remaining interest, and under this deed the parties claimed title to one-half. It appeared, however, that the intent was to convey but two-tenths. *Held*, that, as the deed was liable to be reformed as against all the parties, it was to be assumed that the reformation might occur, and, therefore, in this respect the title was defective. *Scholle v. Scholle*.

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2. The will of R., after giving cer-

tain specific legacies, gave to his executors his residuary estate in trust, with power to receive the rents and profits, sell and convey the property, invest both the rents and profits and proceeds of sale "and to divide and apply the same and income thereof" as directed, *i. e.*, to apply the income of two-sixths of "said residue and remainder" to the use of his wife for life, with remainder over to his children, and to apply the income of one-sixth to each of his four children during life, with remainder over to the issue of such child, and with authority to advance to each child a specified sum out of the principal if the executors should deem best. In the gift of the legacies the testator used the words "give and bequeath," in those of the residuary estate the words used were "devise and bequeath." *Held*, that the final and ultimate division did not require a conversion of the land into money, nor was such a conversion required as respects the intermediate income; that, therefore, the remaindermen took a vested interest in the lands; and that the interests of the grandchildren were not cut off by a foreclosure suit, to which they were not made parties.

Id.

3. When the mortgage which was foreclosed was assigned to S., the plaintiff in the foreclosure suit, R. guaranteed the payment of one-half thereof. After R.'s death S. presented a claim to his executrix, who alone qualified and acted, for one-half, which was disputed. S. then began the foreclosure; the executrix was made a defendant and answered. Pursuant to an arrangement between her and S. she withdrew her answer and executed a deed to S. of R.'s entire interest. S. in return withdrew his claim against the estate and on the foreclosure sale bid in the property for the full amount of the mortgage. *Held*, that the deed was not a good execution of the power of sale and was invalid, as there was no sale such as the will contemplated, but an appropriation of the land to pay a debt, chargeable primarily upon the per-

sonal property, without an order of the surrogate, or proof that the personalty was insufficient to pay debts; also, that the surrogate was powerless to appropriate the land to the payment of debts except in the statutory method. *Id.*

4. Accordingly *held*, that the title proffered was defective and the purchaser was not bound to complete his purchase. *Id.*

— *Partition may not be maintained by heirs pending the existence of a right in executor to exercise a power to sell.*

See Henderson v. Henderson. 1

PARTNERSHIP

1. Where under and by the terms of a copartnership agreement each partner contributes an equal portion of the capital and is to share equally in the profits and losses, after dissolution, an account taken and a settlement of debts and liabilities, a partner who has advanced moneys to the firm is entitled to be repaid the sum advanced out of the remaining assets before distribution is made. *Lesserman v. Bernheimer.* 89

2. In case a partner has overdrawn, his share of the residue will be diminished by the amount of the over-draft, and in case this exceeds the share coming to him, he is liable to the other partners for the excess. *Id.*

3. In an action for an accounting between partners, it appeared that no time was fixed by the articles of copartnership for its continuance. An account of stock was taken and balance struck as of December 31, 1873, with the understanding between the partners that the partnership was to be dissolved and the business wound up; it was not, however, formally dissolved until March 13, 1874, when an agreement of dissolution was entered into between them, by and under which defendant B. was given and took charge of the assets, with

authority to collect and dispose of the same and to pay the firm debts, and he alone was authorized to sign in liquidation. Prior to December 31, 1873, \$3,000 had been paid out of the copartnership funds on account of defendant G., but had not been charged in account. This sum was on that day, without the knowledge or consent of plaintiff, charged to the account of G. and then was credited to that account and charged to profit and loss, thus leaving an apparent balance of capital due to G.; this he thereafter, but before the final dissolution, drew out. In the accounting the referee charged this sum to B. as the liquidating partner. *Held*, error; that until March 13, 1874, when the dissolution agreement was executed and B. took exclusive charge, he had no more authority or control than the other partners, and so could not be made responsible for the acts of G. *Id.*

4. Also, *held*, that in adjusting the capital accounts between the parties it was proper to allow interest upon the balances standing to their credit down to March 13, 1874. *Id.*

5. An action was commenced against the copartners in December, 1873, for an alleged infringement of a patent by the firm, and counsel were employed by it to defend. The action was continued until October, 1876, when it was compromised and release given by the plaintiff therein. B. paid the expenses and disbursements in the defense of the action after the dissolution. It appeared that after L. had concluded to withdraw from the business, B. G. and one S. decided to organize a corporation to continue it. On March 13, 1874, B., as liquidating partner, leased to S. the property and works of the firm with an option to purchase contained in the lease. This was with the knowledge and approval of L., but it did not appear that he knew of the intent to form a corporation, or that his copartners were to be members. The corporation was organized, and B. transferred to it the bulk of the

- stock of the firm, and S., in exercise of the option, purchased the leased property for the benefit of the corporation. These transactions were set up in the pleadings, upon the accounting the sums paid for these transfers were stated and the adjustment was made on the basis of the prices received, without objection on the part of plaintiff, who then had full knowledge of all the facts. The referee found that the said release and settlement of the suit pending was brought about in part by the agreement of B. and G. not to carry on the business and the transfer of the stock in trade of the corporation to another corporation for a sum paid to B. and G., and for this reason the referee refused to allow B. for such expenses and disbursements. *Held*, error; that while plaintiff, on learning the fact that his former copartners were benefited by and interested as purchasers in the sales, might have rejected the adjustment of accounts on the basis of the price received, and either have shared in the profits, if any made by them, or, repudiating the sales, have held the liquidating partner liable for the value of the property; having, after full notice, concluded to treat the sales as valid, this was a ratification thereof, and defendants were not required to answer concerning the disposition of the property, and their failure to do so was no reason for disallowing the expenses; that all he was entitled to was to have disallowed any portion of the expenses which were made for the exclusive benefit of the new corporation. *Id.*
6. B. also paid G. for services rendered by him in said suit after the dissolution. *Held*, that he was entitled to be allowed therefor. *Id.*
7. It is only when there is a general reputation that two or more persons are copartners, and they knowing it, permit others to act upon it, who, induced thereby, give credit to the reputed firm, that these facts can be proved and availed of to estop the reputed members of the firm from denying its existence, and then only in favor of such outside parties. *Adams v. Morrison*. 152
8. In an action wherein plaintiff sought to establish a copartnership between himself and defendant's intestate, as attorneys, plaintiff, as a witness in his own behalf, was allowed to testify to declarations of the deceased to third persons in his presence to the effect that they were copartners. He was then asked: "Who received the receipts of the office?" "Was money paid into the office?" and offered to testify that he did not receive money paid into the office for business done in the office, and that the charges made in a certain case, in which he appeared as attorney, were paid to decedent. This was excluded as immaterial and incompetent under the Code of Civil Procedure (§ 820). *Held*, no error. *Id.*
9. Plaintiff offered to prove, by his own testimony, that about the time he claimed the partnership was formed the deceased made an entry in his presence, in a docket or register, of name of himself and plaintiff as a firm. This was objected to as incompetent under the said Code and excluded. *Held*, no error; that it involved a personal transaction between the witness and deceased. *Id.*
10. In an action to dissolve a law firm, determine its assets and procure a sale of them and a settlement of the partnership affairs, the complaint alleged that certain abstracts of title to real estate in New York and New Jersey were part of the assets. The answer denied the ownership by the firm of said abstracts. An order was made, under objection by defendants, appointing a receiver *pendente lite* and directing him to take possession, among other things, of the abstracts of title in possession of said firm, and, within fifteen days after his qualification, to expose to sale, and sell, the same, although no special or immediate necessity for their sale was shown by the papers. *Held*, error, as by this order the court determined a material issue

upon affidavits in anticipation of the trial and the determination of the issues joined, that the abstracts ought to remain in possession of the receiver, free of access to all parties, until the trial and ultimate determination of the rights of the respective parties. *Brush v. Jay.*

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PAYMENTS.

1. *It seems* the provision of the Code of Civil Procedure (§ 895), declaring that, in order to take a case out of the statute of limitations, an acknowledgment or promise to pay in writing, signed by the party to be charged, is necessary, but that this "does not alter the effect of a payment of principal or interest;" does not change the nature or effect of a part payment. The old rule is recognized and continued and the payment may be proved by oral evidence. *Mills v. Davis.*
- 243
2. In order to make an indorsement upon a promissory note of part payment made by the holder, without the privity of the maker, competent as evidence to meet the defense of the statute of limitations, it must appear that it was made at the time when its operation would be against the interest of the party making it; and so, at least, that it was made before the statute could have operated. *Id.*
3. A purchaser of mortgaged premises, while technically he takes the fee, acquires simply the equity of redemption, and payment by him of the mortgage is a purchase of the interest carved out by the mortgage as a lien, and in equity he holds the fee under the mortgagee as to that interest, and under his grantor as to the equity of redemption. *Everson v. McMullen.*
- 293
4. Where, therefore, the purchaser of the equity of redemption, who is under no personal liability to pay the mortgage debt, pays it in aid of his own title, or procures its discharge by giving his own mortgage upon the premises in lieu

thereof, as against the widow of his grantor who joined with her husband in the mortgage, but not in the deed, said grantee is entitled to the protection of the mortgagee's right as against the dower which is covered and charged by the mortgage. The purchaser takes his land charged as surety for the mortgage debt, and having paid it, has the right, as against the mortgagors, to be subrogated to the position of the mortgagee and to stand in equity as the purchaser and holder of his security, and the widow seeking to enforce in equity her right of dower, is bound to allow her due proportion of the mortgage debt. *Id.*

5. The authority of an agent authorized to collect and receive payment upon securities belonging to his principal, when it is not coupled with an interest, ceases upon the death of the principal, and a payment thereafter made to the agent does not bind the estate of the principal, although the payor was not aware of the death at the time of making the payment; nor does the fact that the agent at the time of payment held the security affect the rights of the principal. *Weber v. Bridgman.*
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See APPLICATION OF PAYMENTS.

PLEADINGS.

1. In an action brought by the purchaser against the executors of the assignee to recover back the purchase-money paid, the complaint alleged that at the time of the sale before offering the premises, the assignee "stated that he had a good title to it," and could and would give a good title as against S.; that plaintiff bid off and paid for the property and accepted a deed thereof, relying upon that statement, and in consideration thereof, and upon the express understanding and condition that the assignee "would indemnify and protect her against any interest in or title to said premises which might thereafter be legally established and enforced" by S.; that S. subse-

quently brought an action of ejectment against plaintiff and the assignee, and, under judgment therein in her favor, recovered possession. There was no averment that the assignee acted fraudulently or with intent to deceive. On the trial plaintiff asked a witness as to the statements made by the assignee at the time of the sale; this was objected to on the ground that whatever statements were made were merged in the written contract. The objection was overruled. *Held*, error. *Clark v. Post*. 17

2. Plaintiff was also permitted to show that he paid the purchase-price and accepted a deed under an agreement on the part of the assignee that he would hold the money until the claim of S. was decided. This was objected to on the ground that nothing of the kind was alleged in the complaint. No request to amend the complaint was made. The objection was overruled. *Held*, error. Also, that, as without this evidence no cause of action was established, a refusal to dismiss the complaint was error.. *Id*

3. A party must allege, as well as prove, the facts constituting his cause of action, and a recovery upon a cause of action, not alleged in the complaint, although proved under objection and exception on the trial, is not sustainable. *Id*

4. In an action upon a promissory note the complaint set forth the note and alleged that plaintiffs were the owners thereof, but did not allege that it was executed by defendant or that any specified sum was due plaintiff thereon as required by the Code of Civil Procedure (§ 534). The answer admitted the execution of the note by defendant; it did not allege payment, but set up as a defense want of consideration. *Held*, that if the complaint would have been held defective on demurrer, the defect was cured by the answer; and that the complaint might be deemed amended. *Cohu v. Husson*. 662

5. The complaint averred that letters of administration were duly issued and granted to plaintiffs by the surrogate of the county of New York and that they duly qualified. *Held*, sufficient; that it was not necessary to set forth the facts showing the surrogate had jurisdiction. *Id*

— *A defense of failure to perform a condition precedent, not available, unless set up in answer.*

See Kirtz v. Peck.

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See GENERAL TERM.
SUPERIOR COURT (N. Y. CITY).
TRIAL.

PLEDGE.

1. In an action to recover possession of certain railroad bonds which the complaint alleged were the property of plaintiff, and of which defendant had become wrongfully and illegally possessed, these facts appeared: T., the original plaintiff, transferred to C. & M., stock brokers, the bonds in question, to be held as margins on his stock transactions. C. & M. deposited them with defendant, a national bank, as security for any indebtedness, present or future, by them to defendant, with authority to sell at public or private sale, without notice, and apply the proceeds in payment of such indebtedness, and on the faith of such deposit defendant promised to pay the checks of C. & M. to a specified amount; simultaneously therewith it certified checks to that amount and on the same day paid them to the holders thereof. On the next business day C. & M. failed, owing defendant a balance of account. Thereafter T. served written notice upon defendant to the effect that the bonds were his property, forbidding its parting with the same except by his order, and demanding an account showing what lien plaintiff claimed to have thereon; this defendant did not furnish. No offer to pay such balance or request to redeem the bonds, or admission of any rights of defendant therein was made by T. *De*

defendants subsequently sold the bonds, realizing less than the balance unpaid. *Held*, that a verdict was properly directed for defendant; that plaintiffs, to maintain the action, were bound to show that no title passed to defendant by the transfer to it, or that at some time prior to the commencement of the action they had become entitled to the possession; that the bank acquired a valid title, and plaintiffs failed to show a right of possession, as they could only establish such a right by proof that the debt for which the bonds were pledged had been wholly paid, or that tender had been made of a sufficient sum to discharge it. *Thompson v. St. N. Nat. Bk.* 325

2. Plaintiff claimed that the certification of the checks without an equivalent amount of money on deposit, being in violation of the National Banking Act (U. S. R. S. § 5208), no valid debt was created thereby, and so defendant did not become a *bona fide* holder of the bonds. *Held*, untenable; *first*, that the act fixes and limits the penalty for its violation, and instead of invalidating, expressly affirms the validity of the certification; *second*, that the provision had no application to the question as the contract of the Bank with C. & M. was simply to protect the checks of the firm, *i. e.*, to loan the amount specified and pay it out on its check, not to certify them; that this contract was lawful and its legality was not affected by the certification. *Id.*

3. Also, *held*, the application by defendant of deposits made by C. & M. on the day the agreement was made to the payment of the prior indebtedness of the firm, instead of to the indebtedness created by the payment of the certified checks, was proper. *Id.*

POSSESSION.

1. Possession of land, *animo dominiendi*, is *prima facie* evidence of title, sufficient as against all persons who cannot show a prior

possession or a better title. *Mayor, etc., v. Carleton.* 284

2. The benefit of such a possession is not lost to the possessor if he leaves the land temporarily vacant, *animo revertendi.* *Id.*

PRACTICE.

1. After a final judgment in an action which does not award an injunction, staying finally and entirely the enforcement of a judgment in another court, and reserves no right to apply upon the foot of the decree, that relief may not be granted by order on affidavits. *Jackson v. Bunnell.* 216
2. A permanent injunction is in no sense a provisional remedy, and can only be granted where the pleadings in an action show its necessity and the remedy is asked as an element of the final relief sought (Code Civil Pro. § 602); and so, it may not be granted by mere order when no action between the parties is pending, although actions covering the controversy have gone to final judgment. *Id.*
3. Where illegal evidence has been received without objection, the remedy of the party is by motion to strike it out; an objection to its reception and an exception is not available. *Parsons v. N. Y. C. & H. R. R. Co.* 355

See APPEAL.

PRESUMPTIONS.

1. Where securities for loans are taken by one person in the name of another, the presumption is that they are the property of the latter, and the possession of the securities by the former, where it appears that he was the agent of the latter, will be deemed to be that of his principal. *Lowery v. Brakine.* 53
2. Defendant, a foreign insurance company, doing business in this state, issued a policy to P., plaintiff.

iff's intestate. Before a payment of premium became due it sent to P. a notice; in attempted compliance with one of the conditions of forfeiture for non-payment of premiums imposed by the act of 1877 (Chap. 821, Laws of 1877), *i. e.*, that "a notice stating when the premium will fall due, and that if not paid the policy * * * will become forfeited and void" must "be duly addressed and mailed to the person whose life is assured, at his last known post-office address, postage paid," at least thirty and not more than sixty days before the premium is payable. The only proof of service of the notice was that it was found among the papers of the deceased two days after his death and seventeen days after the premium became due. The residence of the deceased at the time notice should have been given was "No. 45 Warren street, New York." This was known to and appeared upon defendant's books. The notice was addressed to him at No. 87 Barclay street. *Held*, that it was not to be presumed that the notice was mailed on the day of its date or that the envelope was properly addressed, on the contrary, the presumption, in the absence of other evidence, was that the address on the envelope corresponded to the address on the letter; nor was it to be presumed that the letter reached P. in due course of mail, or at any day earlier than that in which it was found. *Phelan v. N. W. M. L. Ins. Co.* 147

3. Possession of land, *animo domini*, is *prima facie* evidence of title, sufficient as against all persons who cannot show a prior possession or a better title. *Mayor, etc., v. Carleton.* 284

4. Although, as a general rule, fraud is not to be presumed, and a party seeking to relieve himself from an obligation on that ground must prove it, yet when the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality, and that either on the one side from superior knowledge of the matter

derived from a fiduciary relation, or from over-mastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced or undue influence used, and that all was fair, open, voluntary and well understood. *Green v. Roworth.* 462

5. Where, therefore, a father, an aged man, who had become much enfeebled, mentally and physically, took his two sons into partnership and turned over to them the management and control of his property and business affairs, and was accustomed to rely upon their advice and counsel, and after they had already obtained from him the larger portion of his property without any adequate consideration, he, without consideration, in the absence of a legal adviser, executed to them a deed of his real estate in ignorance of its legal effect, the conveyance leaving the grantor comparatively destitute, *held*, that fraud was legally imputable to the grantees, requiring explanation from them; and this not having been given, that a finding of fraud and undue influence was justified. *Id.*

6. In the contempt proceedings against B., witnesses were ordered to be examined, who were cross-examined by B., without objection or protest. It was objected on appeal that the court had no power to make such order. *Held*, that B. must be deemed to have assented to the practice adopted. *King v. Barnes.* 476

7. Although a gift by express terms is not made in a will, a legacy by implication may be upheld where the words of the will leave no doubt of the testator's intent and can have no other reasonable interpretation. *In re Vowers.* 569

8. In an action upon a personal judgment of a Canada court the complaint alleged, as the ground of

jurisdiction, that defendant appeared in the action. The answer denied this allegation and affirmatively alleged that the court had no jurisdiction to render the judgment, as defendant neither appeared in the action nor was served with process. Upon the trial plaintiff introduced the judgment record, which showed on its face that the service was made upon defendant at his residence within this state. *Held*, that the service was ineffectual to give the judgment validity here if defendant was not a citizen of Canada or domiciled within that jurisdiction; that defendant's place of residence is to be presumed his domicile, and nothing having been shown to rebut that presumption, the service was ineffectual and the judgment had no validity here. *Shepard v. Wright*. 582

PRINCIPAL AND AGENT.

1. Where securities for loans are taken by one person in the name of another, the presumption is that they are the property of the latter, and the possession of the securities by the former, where it appears that he was the agent of the latter, will be deemed to be that of his principal. *Louery v. Erskine*. 52
2. J., plaintiff's testator, loaned certain moneys to various parties, taking bonds and mortgages and a promissory note, all payable to defendant, all of which were in J.'s possession at the time of his death. In an action to recover possession of said securities, which plaintiffs alleged to have been the property of the testator, and to have been unlawfully taken by defendant from them, it appeared that J. had moneys in his hands belonging to defendant, who was his niece; that he stated to the borrowers and to others that the moneys loaned belonged to defendant; that at his request defendant had executed to him a power of attorney, among other things, "to govern and control all bonds and mortgages, to sell and transfer the same, * * * to take charge

of all personal property * * * that he may now have in his possession." The only explanation on the part of plaintiffs was a declaration contained in a paper alleged to have been delivered by the testator to one of the plaintiffs prior to his death, wherein he expressed his wishes with reference to the disposition of these securities after his death, and stated that he had taken the mortgages in the name of his niece to avoid being taxed for the same. *Held*, that such declaration was incompetent to defeat the defendant's title; and that a finding of the trial court that plaintiffs were entitled to the securities was not justified by the evidence and was properly reversed by the General Term. *Id.*

3. The authority of an agent authorized to collect and receive payment upon securities belonging to his principal, when it is not coupled with an interest, ceases upon the death of the principal, and a payment thereafter made to the agent does not bind the estate of the principal, although the payor was not aware of the death at the time of making the payment; nor does the fact that the agent at the time of payment held the security affect the rights of the principal. *Weber v. Bridgman*. 600
4. In 1871 W. executed to H. a power of attorney, authorizing him, among other things, to collect and receive moneys becoming due from any person to his principal, and to execute discharges therefor, etc. H. purchased a bond and mortgage, receiving an assignment thereof to W., and as agent collected the interest thereon as it fell due, receipting therefor in the name of W. The latter died in Germany in January, 1874. The bond fell due in May of that year and was paid by B., the then owner of the mortgaged premises, to H., who executed a satisfaction of the mortgage and delivered to the payor the bond and mortgage, the assignment and the power of attorney. H. knew at the time of the death of W., but he did not disclose the fact to B., and the latter made no inquiries. In an action brought in

1885 to foreclose the mortgage the court found that H. never accounted to plaintiff, administratrix of W., for the bond and mortgage or the proceeds, and that plaintiff never assented to or ratified the payment, and did not know of the existence of the bond and mortgage or the cancellation thereof until within a short time of the commencement of the action. *Held*, that the payment was invalid, and in the absence of evidence that the personal representatives of the decedent assented or ratified it was no defense; that the fact that H. had possession of the securities did not affect the question, as B. had full notice of the extent of and limit to the authority of H. *Id.*

QUESTIONS OF LAW AND FACT.

It is not sufficient to excuse a person from the consequences of a fatal assault upon another, that he was provoked thereto by an angry controversy of words alone, however aggravating, and when the parties are unequal in strength, and the assaulting party being the stronger, and having no reason to apprehend physical injury from the other, uses a dangerous weapon, the question whether it was used with homicidal intent is one of fact for the jury. *People v. Kelly*. 647

RAILROAD CORPORATIONS.

1. S., plaintiff's intestate, was in defendant's employ as a brakeman upon a freight train. A car loaded with lumber at a way station was to be attached to the train. It was being moved by the engine from the switch to the main track. S. got upon it to stop it, but in consequence of the improper manner in which the car was loaded the brake was rendered useless, a collision occurred and S. was thrown from the car and killed. In an action to recover damages, it appeared that the car and its appliances, before it was loaded was in good condition. It was, by de-

fendant's rules, made the duty of the station-master to either inspect the car himself or have some one do so before it was taken out. Had this been done the improper loading would have been discovered. *Held*, that defendant having provided a safe car and a system and competent men for its inspection, for injuries resulting to a co-employee, for their neglect of this duty, it was not liable. *Byrnes v. N. Y., L. E. & W. R. R. Co.* 251

2. Also *held*, the question was not affected by the fact that the car was loaded by the owner of the lumber. *Id.*

3. Also *held*, that the question was sufficiently raised by a motion for a nonsuit based on the ground that no negligence of the defendant had been shown. *Id.*

4. Where a railroad corporation organized under the "Rapid Transit Act" (Chap. 606, Laws of 1875), is authorized by its charter to construct distinct lines of railway "with the usual and necessary * * * curves, switches," etc., on two streets intersecting each other, it is within the scope of the powers conferred upon the company by the act and its charter to acquire title to, and it may take, by proceedings *in invitum*, lands necessary to effect a junction between the two routes, so as to enable the trains upon one to run upon the other. *In re Un. El. R. Co.* 275.

5. The provision of said act (§ 26), which permits the junction of two railroads, comprehends the power to take real estate necessary to effect the connection, and it is not material that the two roads are operated by the same corporation. *Id.*

6. While, unless the proposed taking of lands by the law of eminent domain is justified by a purpose or end, permitted or clearly contemplated by the franchise conferred upon a railroad corporation by its charter or the general law, the courts should refuse their aid, the

- powers of the corporation must be deemed to extend to the accomplishment of legitimate corporate acts, and to whatever may be within the scope of the legislative grant. *Id.*
7. It is for the Supreme Court to investigate the facts upon which the corporation claims the right to take private property against the owner's will, and thereupon to decide whether a sufficient ground exists. *Id.*
8. *It seems*, if the corporate charter authorizes the proposed taking and the action of the corporation appears to be free from any imputation of unworthy or dishonest motives, the court may not interfere with the exercise of the power; the only limit to its exercise is the reasonable necessity of the corporation in the discharge of its duty to the public. *Id.*
9. Where the Supreme Court has granted such an application, and the power to take lands for the corporate purposes is found clearly to exist in the charter and general law, and the purpose stated is one within the contemplation of the legislative act, this court will not interfere with the conclusions of the Supreme Court as to the necessity for taking the land, if reached after due proceedings as prescribed; its review will be confined to those questions which relate to the validity and legality of the proceedings. *Id.*
10. The act of 1878 (Chap. 647, Laws of 1878), requiring the B. S. & F. R. R. Co., a street railroad corporation organized under the General Railroad Act (Chap. 140, Laws of 1850), to pay into the treasury of the city of New York one per cent of the gross receipts instead of a license fee as before prescribed (Chap. 199, Laws of 1873), is constitutional; it must be deemed an alteration and amendment of the charter of the company, and so is within the power reserved to the legislature by the general act, the provisions of the Revised Statutes to which corporations organized under said act are by its terms made subject and the state Constitution. (Art. 8, § 1.) *Mayor, etc., v. Twenty-third St. R. R. Co.* 811
11. The said company leased its property rights, privileges and franchises to the defendant. There was nothing in the lease imposing upon the lessee the obligation to pay the percentage. In an action to compel such payment, *held*, that while no such obligation was imposed by the acts authorizing said company to lease its road (Chap. 199, Laws of 1873; chap. 389, Laws of 1875) or by any statute, defendant upon taking the place of its lessor, as to its charter rights and power, took its place also, as to its charter obligation and duties, and was not entitled to exercise the former without discharging the latter, and that, therefore, the action was maintainable. *Id.*
12. The duty of active vigilance required of persons going upon railroad tracks must be adapted to the circumstances of the case, and when the company, by its own conduct and its published regulations, has led the public to believe trains will not be run upon its tracks at specified times and places, persons having occasion to cross them have the right to rely upon these assurances, and are not necessarily guilty of negligence when injured by prohibited trains while doing so. *Parsons v. N. Y. C. & H. R. R. Co.* 855
13. In an action to recover damages for alleged negligence causing the death of M., plaintiff's testator, these facts appeared: M. was a passenger on one of defendant's trains going north; he got out at a way-station on the west side of the track, walked quite rapidly to the north a short distance by the side of the train, and then, in attempting to cross a track to the west, was struck and killed by a freight engine which was moving rapidly backward. When he saw the engine he attempted to jump from the track, but failed to escape. The accident occurred within the station-yard upon grounds where passengers were accustomed to

pass and re-pass in going to and from trains. Defendant's rules require freight trains to approach stations slowly and to stop before reaching a station, at which a passenger train is landing or receiving passengers. The freight train was visible from the station at the distance of about three hundred feet, but was partially concealed from view by a curve in the road and by trusses on a bridge which it crossed before reaching the station, and about twenty feet south of which the decedent was killed. No one saw the engine approaching until it got upon the bridge. The freight train was moving about forty feet a second; not more than ten seconds elapsed between the time M. alighted and when he was struck. During this time the engine of the passenger train was blowing off steam, making a loud noise. *Held*, that the case was properly submitted to the jury and the evidence justified a verdict for plaintiff; that M., having once looked when he alighted and seeing no train, had a right to assume none would be coming at such a rate of speed as would preclude him from crossing the track; also, that it was immaterial whether M. when he alighted ceased to be a passenger or not. *Id.*

14. Defendant claimed and gave evidence tending to show that the engineer in charge of the freight engine attempted to stop the train on approaching the station, by reversing the lever and shutting off steam, but was temporarily disabled from controlling it by a blow received from the lever, which slipped from its position after being reversed and struck him. Expert testimony was given tending to show that such an accident could not occur if the lever was properly reversed except from a defective appliance. *Held*, that the fact that the engineer was thus disabled did not excuse defendant from the charge of negligence. *Id.*

15. *It seems* a passenger on a railroad train does not lose his character as such by alighting at a regular sta-

tion, although he has not yet arrived at the terminus of his journey. *Id.*

16. An action against a railroad corporation to recover the amount of interest coupons upon bonds issued by another similar corporation, based upon an agreement between the two companies, by which defendant has become liable for their payment, is not an action "founded upon a note or other evidence of debt, for the absolute payment of money" within the meaning of the provision of the Code of Civil Procedure giving to such an action against a corporation a preference upon the calendar. (§ 791, sub. 8.) *Polhemus v. F. R. R. Co.* 617

17. Nor do the facts, upon which such an action is based, furnish a reason for giving it a preference, by the court, in the exercise of its discretion; plaintiff stands in no better position than ordinary litigants. *Id.*

18. The neglect of the employees of a railroad company to ring the bell or blow the whistle of an engine approaching a crossing does not excuse a traveler on the highway from exercising care on his part, in looking and listening before crossing the railroad tracks, in order to escape the danger of moving trains. *Cullen v. Pres., etc., D. & H. C. Co.* 667

— *The act of 1873 (Chap. 185, Laws of 1873), authorizing a corporation organized under the act of 1868 (Chap. 842, Laws of 1868), for the purpose of transmitting letters, packages, etc., by means of pneumatic tubes, to transform itself into a railroad corporation, unconstitutional.*

See Astor v. N. Y. A. R. Co. 93

RECEIVER.

In an action to dissolve a law firm, determine its assets and procure a sale of them and a settlement of the partnership affairs, the complaint alleged that certain abstracts of title to real estate in New York and New Jersey were part of the assets. The

answer denied the ownership by the firm of said abstracts. An order was made, under objection by defendants, appointing a receiver *pendente lite* and directing him to take possession, among other things, of the abstracts of title in possession of said firm, and, within fifteen days after his qualification, to expose to sale, and sell, the same, although no special or immediate necessity for their sale was shown by the papers. *Held*, error, as by this order the court determined a material issue upon affidavits in anticipation of the trial and the determination of the issues joined; that the abstracts ought to remain in possession of the receiver, free of access to all parties, until the trial and ultimate determination of the rights of the respective parties. *Brush v. Jay.* 482

RECOVERY OF POSSESSION OF PERSONAL PROPERTY.

See CLAIM AND DELIVERY.

REFERENCE.

1. Where, in an action for the dissolution of a copartnership and for an accounting, an order was entered by consent referring it to a referee named to hear and determine the issues, to take and state the accounts and report the amount for which judgment should be entered in favor of either party against the other, and where, upon the report of the referee, which did not contain separate findings of law and of fact as required by the Code of Civil Procedure (§ 1023) and was otherwise informal and incomplete, an interlocutory judgment was entered, *held*, that the Supreme Court had power to set aside the report and the judgment, and with the exercise of its discretion in this respect this court could not interfere; but that in the absence of allegations of misconduct on the part of the referee the Supreme Court had no power to set aside the order of reference and all proceedings under it and to refer the

case to a new referee to try the same, *de novo*, but should have sent the case back to the referee; also, that a provision in the order that the evidence already taken might, by the consent of both parties, be read before the new referee, did not validate it. *Maicas v. Leony.* 619

2. *It seems*, if the referee committed any errors of law or fact, the remedy was by appeal from the judgment entered upon his report. *Id.*

RELIGIOUS CORPORATIONS.

1. The provision of the Revised Statutes (1 R. S. 388, § 4, sub. 7), exempting from taxation "the personal property of every incorporated company not made liable to taxation on its capital in the fourth title" of the chapter containing it, does not include an incorporated college or religious society. *Cutlin v. Trustees, etc.* 138
2. A religious society, therefore, incorporated under the general act of 1813 (Chap. 60, Laws of 1813), providing for the incorporation of such societies, and a college not specially exempted from taxation by its charter or some special act, are included in the provision of the collateral inheritance tax act (Chap. 718, Laws of 1887), which subjects to the tax imposed by the act all property which shall pass by will to any "body, politic or corporate * * * other than to * * * the societies, corporations and institutions now exempted by law from taxation." *Id.*

REMAINDERS.

See WILLS.

REMEDIES.

1. Money in the hands of one person to which another is equitably entitled, may be recovered by the latter in a common-law action for

money had and received, subject to the restriction that the mode of trial and the relief which can be given in a legal action is adapted to the exigencies of the case and is capable of adjustment in such an action without prejudice to the interests of other parties. *Roberts v. Ely.* 128

2. No privity of contract is required to sustain such an action, except that which results from the circumstances, and it is immaterial whether defendant's original possession was rightful or wrongful. *Id.*

3. The fact that the relation between the parties has a trust character does not, *ipso facto*, in all cases, exclude the jurisdiction of a court of law. *Id.*

4. So long as the purchaser of lands remains in possession under his deed he has no defense to an action for the purchase-price. His remedy in case of failure or defect in title is by action on the covenants in his deed or contract. *Kirtz v. Peck.* 222

5. In pursuance of an ante-nuptial agreement, T., defendant's testator, executed to plaintiff, his wife, an instrument, by which he agreed to pay to her \$10,000 at his death, provided she lived with him as his wife up to that time and faithfully performed the duties of that relationship. Subsequently the parties executed another instrument, by which plaintiff, in consideration of \$5,000 then paid to her by her husband, released and canceled the former agreement. In an action upon the original agreement, *held*, that while the later one, so long as it remained executory, could not have been enforced, yet having been executed, in the absence of any allegation of fraud, plaintiff was not entitled to be relieved therefrom; that having released her husband's obligation she could be reinstated in her rights under it only by a suit in equity instituted for that purpose. *Tallinger v. Mandeville.* 427

—When remedy for error com-

mitted by referee is by appeal, not by application to set aside report and order of reference.

See Maicas v. Leony. (Mem.) 619

REPLEVIN.

See CLAIM AND DELIVERY

SAVINGS BANKS.

1. J. deposited a sum of money with defendant in trust for E., his wife, plaintiff's testatrix. A pass-book was delivered to him. After the death of both husband and wife and the issuing of letters testamentary to plaintiff, he called with them at defendant's bank and demanded payment of the deposit; he was told by one of its officers that it would be paid to him when he came with the pass-book which was then in possession of the executor of J.; thereafter the latter presented the pass-book, together with proof of his appointment, and thereupon defendant paid the deposit to him on surrender of the pass-book. In an action to recover the sum deposited it appeared that plaintiff, after learning of the payment, brought suit against J.'s executor to recover the money so paid and recover judgment therein, and being unable to collect the same, brought this action. *Held* (RUGER, Ch. J., dissenting), that plaintiff had an election of remedies, *i. e.*, either an action against defendant to recover the deposit, or an action against J.'s executor for money had and received; but he was not entitled to both, and by electing the latter remedy he lost the former, as by so doing he adopted and ratified the action of defendant in making the payment, and this would be a good defense in an action by defendant against J.'s executor to recover back the money paid to him. *Fowler v. Bowers Savings Bk.* 450

2. *It seems* that if the money had been left on special deposit, plaintiff could have pursued it in the hands of said executor without

losing his remedy against defendant. *Id.*

8. The defense that the payment by the bank had been adopted and ratified by plaintiff was not set up in the answer. This objection was not raised upon the trial, and all the facts pertaining to such defense were proved without objection and were found by the court. *Held*, that the objection was not available here. *Id.*

SPECIFIC PERFORMANCE.

1. In proceedings to compel a purchaser at a partition sale to complete his purchase, it appeared that R. formerly owned an undivided seven-tenths of the land in question; he conveyed two-tenths, and thereafter executed a deed which purported to convey his remaining interest, and under this deed the parties claimed title to one-half. It appeared, however, that the intent was to convey but two-tenths. *Held*, that, as the deed was liable to be reformed as against all the parties, it was to be assumed that the reformation might occur, and, therefore, in this respect the title was defective. *Scholle v. Scholle*. 261
2. The will of R., after giving certain specific legacies, gave to his executors his residuary estate in trust, with power to receive the rents and profits, sell and convey the property, invest both the rents and profits and proceeds of sale "and to divide and apply the same and income thereof" as directed, *i. e.*, to apply the income of two-sixths of "said residue and remainder" to the use of his wife for life, with remainder over to his children, and to apply the income of one-sixth to each of his four children during life, with remainder over to the issue of such child, and with authority to advance to each child a specified sum out of the principal if the executors should deem best. In the gift of the legacies the testator used the words "give and bequeath," in those of the residuary estate the words used were "devise and bequeath." *Held*, that the final and ultimate division did not require a conversion of the land into money, nor was such a conversion required as respects the intermediate income; that, therefore, the remaindermen took a vested interest in the lands; and that the interests of the grandchildren were not cut off by a foreclosure suit, to which they were not made parties. *Id.*
3. When the mortgage which was foreclosed was assigned to S., the plaintiff in the foreclosure suit, R. guaranteed the payment of one-half thereof. After R.'s death S. presented a claim to his executrix, who alone qualified and acted, for one-half, which was disputed. S. then began the foreclosure; the executrix was made a defendant and answered. Pursuant to an arrangement between her and S. she withdrew her answer and executed a deed to S. of R.'s entire interest. S. in return withdrew his claim against the estate and on the foreclosure sale bid in the property for the full amount of the mortgage. *Held*, that the deed was not a good execution of the power of sale and was invalid, as there was no sale such as the will contemplated, but an appropriation of the land to pay a debt, chargeable primarily upon the personal property, without an order of the surrogate, or proof that the personalty was insufficient to pay debts; also, that the surrogate was powerless to appropriate the land to the payment of debts except in the statutory method. *Id.*
4. Accordingly *held*, that the title proffered was defective and the purchaser was not bound to complete his purchase. *Id.*
5. Where a stipulation between the parties to discontinue an action in the Marine Court of the city of New York and that a judgment therein shall be discharged and vacated of record had been lost, *held*, that the judgment-debtor could maintain an action to establish and compel the specific performance of the contract; that,

- assuming such debtor had a remedy by motion in the Marine Court, as to which *quære*, this was no defense to the action. *Deen v. Milns.* 308
6. It is not a fatal obstacle to a suit for a specific performance that the contract does not relate to lands. *Id.*
7. In such an action it appeared that, upon the trial of an action brought by the defendant against the plaintiff in the Supreme Court, the court held that the Marine Court judgment was a bar, and that to remove the obstacle the parties entered into the stipulation to discontinue. *Held*, that there was a sufficient consideration for the agreement. *Id.*
8. *It seems* an agreement to discontinue an action includes, as a necessary consequence the vacation of a judgment, either interlocutory or final, entered therein. *Id.*
9. Mere delay for a period, short of that prescribed by the statute of limitations, does not necessarily bar the action for specific performance of such an agreement; it must appear that changes have taken place and circumstances occurred, rendering it inequitable to enforce the performance. *Id.*
10. In an action to compel the specific performance of a contract on the part of defendant to purchase certain property situate in the county of New York, these facts appeared: C. died intestate in Indiana, in 1845, seized of the premises. In 1850 one P., a creditor of C., obtained letters of administration of his goods, etc., from the Surrogate's Court of Richmond county. The petition upon which the letters were granted stated that C. "died possessed of personal property in the state of New York." Subsequently, and before letters were issued, the petitioner presented an affidavit showing the existence of assets in Richmond county. The letters recited that C. left assets unadministered in said county. P. subsequently made due application for authority to mortgage, lease or sell the real estate of C. for the payment of his debts, and in 1851, such authority having been granted, the premises in question were sold to plaintiff's testator, A., who died in 1872. In 1886 the agreement in question was executed between his executors and defendant. Defendant objected to the title that the Surrogate's Court did not acquire jurisdiction to issue letters to P. as administrator of C., and that the proceedings instituted by P. for a sale of the real estate were defective and ineffectual to confer any title to the land. *Held*, untenable; that the statutory requirement of assets in the county was met by the petitioner; that the recital in the letters was *prima facie* evidence of the existence of the facts stated, and the record showed that the necessary facts were alleged and proved upon which the surrogate acted in granting them; that his determination upon the proofs, however erroneous, cannot be disturbed by an attack upon it in a collateral proceeding. *O'Connor v. Eugina.* 511
11. It was claimed, and it appeared, that the order to show cause why a sale should not be had was made returnable one day later than the time limited by statute, which requires all persons interested to appear at a time and place specified, "not less than six weeks nor more than ten weeks from the time of making such order." (2 R. S. 107, § 5.) *Held*, that there was no substantial departure from the requirements of the statute; that if there was an irregularity, it was not one which abridged the rights of anyone, and was not a jurisdictional defect. *Id.*
12. The trial judge found, upon sufficient evidence, that plaintiff's testator had been in continual occupation and possession of the premises in question under a claim of title founded upon deeds from 1851; that the lands had been protected by a substantial enclosure; that plaintiffs and their testator had paid the taxes and assessments upon the same. After testator's

death the plaintiffs had rented the premises. There was no proof or pretense of any other claim to the property lying either in grant or in claim. *Held*, that a valid grant must be presumed as arising from an exclusive and uninterrupted possession under a claim of title founded on a conveyance for more than twenty years; that such a presumption will always displace objections based on flaws in the proceedings in which the title has had its source and protect it from being injured by their disclosure.

Id.

18. The time for the completion of the purchase was extended by mutual consent to January 17, 1887. *Held*, that interest on the purchase-money should be computed from that time only. *Id.*

STATUTES.

- *Chap. 842, Laws of 1869.*
- *Chap. 508, Laws of 1874.*
- *Chap. 185, Laws of 1876.*
- *Chap. 454, Laws of 1881.*
- *Chap. 312, Laws of 1886.*
- See Astor v. N. Y. Arcade R. Co.*, 93.
- *Chap. 60, Laws of 1818.*
- *Chap. 654, Laws of 1858.*
- *Chap. 456, Laws of 1857.*
- *Chap. 713, Laws of 1887.*
- 1 R. S. 388, § 4, *subd. 7.*
- See Catlin v. Trustees Trinity College*, 133.
- *Chap. 321, Laws of 1877.*
- See Phelan v. N. W. Mut. L. Ins. Co.*, 147.
- *Chap. 373, Laws of 1849, § 2.*
- 1 R. S. 728, § 55, *subd. 3. Id.*
- 782, § 78; *Id.* 783, § 55, *subd. 3.*
- See Genet v. Hunt*, 158.
- *Chap. 483, Laws of 1835.*
- *Chap. 713, Laws of 1887.*
- See In re Enston*, 174.
- *Chap. 350, Laws of 1866.*
- *Chap. 410, Laws of 1882, § 827.*
- *Chap. 397, Laws of 1883.*
- 1 R. S. 388, § 4, *subd. 3.*
- See Y. M. C. A. v. Mayor, etc.*, 187.
- 1 R. S. 727, § 471.
- See Asche v. Asche*, 232.
- *Chap. 606, Laws of 1875.*
- See In re Un. El. R. R. Co.*, 275.
- *Chap. 246, Laws of 1889.*
- See Mayor, etc., v. Carleton*, 284.

- *Chap. 140, Laws of 1850.*
- *Chap. 199, Laws of 1873.*
- *Chap. 647, Laws of 1878.*
- *Chap. 389, Laws of 1875.*
- See Mayor, etc., v. Twenty-third St. R. Co.*, 311.
- 2 R. S. 87, § 27.
- See Smith v. Cornell*, 320.
- 2 R. S. 66, § 52.
- See In re Wells*, 396.
- *Chap. 388, Laws of 1870, § 87.*
- See Mayor, etc., v. Sonneborn*, 423.
- 1 R. S. 726, § 40.
- See In re Crossman*, 503.
- 2 R. S. 90, § 56; *Id.* 107, § 5.
- See O'Connor v. Huggins*, 511.
- *Chap. 814, Laws of 1858, § 1.*
- See Harvey v. McDonnell*, 526.
- *Chap. 410, Laws of 1882, § 86, subd. 4.*
- See Cohen v. Mayor, etc.*, 532.
- *Chap. 84, Laws of 1871.*
- See In re Crawford*, 580.
- *Chap. 498, Laws of 1887.*
- See People v. Kelly*, 647.
- *Chap. 205, Laws of 1863.*
- See Perkins v. State of N. Y.*, 660.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STIPULATION.

1. Where a stipulation between the parties to discontinue an action in the Marine Court of the city of New York and that a judgment therein shall be discharged and vacated of record had been lost, *held*, that the judgment-debtor could maintain an action to establish and compel the specific performance of the contract; that, assuming such debtor had a remedy by motion in the Marine Court, as to which *quære*, this was no defense to the action. *Deen v. Milne*. 303
2. In such an action it appeared that, upon the trial of an action brought by the defendant against the plaintiff in the Supreme Court, the court held that the Marine Court judgment was a bar, and that to remove the obstacle the parties entered into the stipulation to discontinue.

Held, that there was a sufficient consideration for the agreement. *Id.*

STREETS.

See HIGHWAYS.

SUBROGATION.

Where the purchaser of the equity of redemption of mortgaged premises, who is under no personal liability to pay the mortgaged debt, pays it in aid of his own title, or procures its discharge by giving his own mortgage upon the premises in lieu thereof, as against the widow of his grantor who joined with her husband in the mortgage, but not in the deed, said grantee is entitled to the protection of the mortgagee's right as against the dower which is covered and charged by the mortgage. The purchaser takes his land charged as surety for the mortgage debt, and having paid it, has the right, as against the mortgagors, to be subrogated to the position of the mortgagee and to stand in equity as the purchaser and holder of his security, and the widow seeking to enforce in equity her right of dower, is bound to allow her due proportion of the mortgage debt. *Everson v. McMullen.* 298

SUPERIOR COURT (N. Y. CITY).

The Special Term of the Superior Court of the city of New York has the power to suspend, by order, the operation of a judgment rendered by it in an equity case, or to relieve the defendant from the duty of immediate obedience pending an appeal to this court, where the appeal does not of itself relieve, and a mere order staying proceedings on the part of plaintiff would not effect that purpose. *Genet v. Prest., etc., D. & H. C. Co.* 472

SUPREME COURT.

1. Where no undertaking has been filed or served upon appeal to this court, the Supreme Court has no power to grant an order allowing the appellant to perfect his appeal by filing an undertaking. *Nelson v. Tenney.* 616

2. Where, in an action for the dissolution of a copartnership and for an accounting, an order was entered by consent referring it to a referee named to hear and determine the issues, to take and state the accounts and report the amount for which judgment should be entered in favor of either party against the other, and where, upon the report of the referee, which did not contain separate findings of law and of fact as required by the Code of Civil Procedure (§ 1023), and was otherwise informal and incomplete, an interlocutory judgment was entered, *held*, that the Supreme Court had power to set aside the report and the judgment, and with the exercise of its discretion in this respect this court could not interfere; but that in the absence of allegations of misconduct on the part of the referee the Supreme Court had no power to set aside the order of reference and all proceedings under it and to refer the case to a new referee to try the same, *de novo*, but should have sent the case back to the referee; also, that a provision in the order that the evidence already taken might, by the consent of both parties, be read before the new referee, did not validate it. *Maisas v. Leony.* 619

3. As to whether relief will be given to an attorney, having a lien upon a judgment for his costs, against a fraudulent satisfaction thereof by his client upon a summary application by motion, or will require him to bring suit, is within the discretion of the Supreme Court, and its determination is not reviewable here. *Hovitt v. Merrill.* 630

SURROGATES' COURTS.

1. Where, upon the trial of an issue

- of fact by a surrogate, the evidence on each side is so nearly balanced that a determination either way would not be reversed upon appeal, it may not be said that the losing party is not prejudiced by material testimony of an incompetent witness, given under objection and exception, and the admission of such testimony is error requiring a reversal. *In re Eysman*. 62
2. Where the probate of a will is contested on the ground of want of testamentary capacity on the part of the testator, and that the will was not duly executed, a legatee or devisee, who is not a subscribing witness, is not competent, under the Code of Civil Procedure (§ 829), to testify to personal transactions or communications with the decedent, preceding, attending or succeeding the execution of the will. *Id*.
 3. This rule excludes not only testimony of transactions directly between the witness and the deceased and communications made by the latter to the former, but of any transaction between the deceased and others, in any portion of which the witness participated, or any conversation in his hearing, although not with or addressed to him; also, any testimony as to the acts and conduct of the testator observed by the witness tending to show mental capacity. *Id*.
 4. The provision of said Code (§ 2544), providing that "a person is not disqualified or excused from testifying respecting the execution of a will by a provision therein whether it is beneficial to him or otherwise," refers only to the subscribing witnesses to a will, it does not operate as a repeal by implication, so far as it relates to testimony as to the execution of a will of the prohibitory clause above referred to, nor does it authorize or permit a beneficiary under the will to testify where, under the former clause, his testimony would be excluded. *Id*.
 5. Although Surrogates' Courts are courts of special and limited jurisdiction, where jurisdiction to act exists their orders or decrees are conclusive until they are revoked or reversed on appeal. (2 R. S., 80, § 56.) *O'Connor v. Huggins*. 511
 6. That conclusiveness, in the absence of fraud or collusion, attaches in a case where a jurisdictional fact is in question and it appears there was proof with respect to its existence, upon which the surrogate decided. *Id*.
 7. A surrogate is not confined to any form of procedure or mode of proof in acting upon an application for letters of administration, and may take proof by affidavit. *Id*.
 8. The administration of assets of the estate of a decedent is peculiarly within the cognizance of equity, and a Surrogate's Court, in adjusting the accounts of executors or administrators, is governed by principles of equity as well as of law; it is not prevented by any rule of law from doing exact justice to the parties, according to the equities, within the confines only of statutory provisions. *In re Niles*. 547
 9. V. died, leaving a widow but no children. His will, after a provision made for his wife, contained this clause: "This provision to be accepted by my wife in lieu of her dower right and distributive share in my estate, she to make her election, whether she accepts this provision of my will, within sixty days from the time of proving the same." The widow within the time specified made her election, rejecting the provision. The residuary estate was given to a nephew of the testator. In proceedings for the probate of the will, *held*, that, aside from her dower right, the widow was entitled to such share of the personal estate as the law would have given her had the deceased died intestate. *In re Vickers*. 569
 10. The executor claimed that the widow had no right to raise the question of construction, upon probate of the will, as it involved both real and personal estate. *Held*, untenable; that the widow simply

put in issue a disposition of personal property, and such a disposition the Code of Civil Procedure (§ 2624) permits a party to put in issue upon probate. *Id.*

SUSPENSION OF POWER OF ALIENATION.

1. The will of H., after authorizing and directing his executor to "partition, divide and apportion" his residuary estate among his children living at the time of such partition, and the issue of any child or children who had died leaving issue, provided as follows: "And I do hereby give, devise and bequeath to each of my said children the share or portion of my said estate so to be partitioned, divided and apportioned to them, respectively, as aforesaid. * * * If any of my children shall die without issue before such partition and division shall be made, then I give the portion of such deceased child equally to the brothers and sisters of such deceased child. * * * If any of my said children shall die leaving issue, then the child or children (who shall be living at the time of such partition) of such deceased child of mine shall take and have the share or portion which the parent would have if living. * * * It is my will that my executor make the partition * * * as soon after my decease as practicable, having reference to the condition of my estate; but as he may find it necessary to realize upon securities, and sell and convert into money both real and personal property, * * * which he may not be able speedily to make without sacrifice and loss to my estate, he shall not be compelled to make such partition, etc., * * * until after the lapse of five years from the probate of this will." The executor was directed, to until the partition of the estate, to pay \$2,400 per annum to each of the children from the testator's decease, and to charge the payment to the child as part of his or her share of the estate.

The executor was authorized to take entire charge of all the real and personal estate, to lease, collect rents, insure, repair, make investments, pay taxes, etc. All of the testator's children were living and of full age at the time of his decease. In an action for the construction of the will, *held*, that no unlawful perpetuity was created by authorizing the executor to delay partitioning the estate for five years, as the power of sale was not suspended; and that there was no equitable conversion of the realty into personalty, the power of sale not being absolute. *Henderson v. Henderson.* 1

2. Also, *held*, that the provision restricting the limitation over to such of the issue of a deceased child as "shall be living at the time of such partition," was void, as it would prevent the absolute vesting of the share in the issue of a deceased child at the time of the parent's death; but as it was inconsistent with the earlier provisions of the same clause, and unnecessary, so far as the perfecting of a testamentary scheme for disposing of the residuary estate is concerned, it should not be allowed to prevail over the preceding direction, when by cutting it off and disregarding it as a void direction, the will could be effectuated according to the plain and just intent of the testator. *Id.*
3. If the principal disposition of a will can be upheld, ulterior, contingent limitations, which threaten violation of statutory rules respecting the ownership of property, if separable from the principal dispositions, may and should be disregarded. *Id.*
4. In 1853, C., in contemplation of marriage, executed a trust deed of all her estate, real and personal, to certain trustees to hold the same during coverture or until her death, if she should "not survive her said coverture," and apply the profits and income "as received, and not by anticipation," to her sole and separate use. In case of her death during coverture the

powers of the corporation must be deemed to extend to the accomplishment of legitimate corporate acts, and to whatever may be within the scope of the legislative grant. *Id.*

7. It is for the Supreme Court to investigate the facts upon which the corporation claims the right to take private property against the owner's will, and thereupon to decide whether a sufficient ground exists. *Id.*

8. *It seems*, if the corporate charter authorizes the proposed taking and the action of the corporation appears to be free from any imputation of unworthy or dishonest motives, the court may not interfere with the exercise of the power; the only limit to its exercise is the reasonable necessity of the corporation in the discharge of its duty to the public. *Id.*

9. Where the Supreme Court has granted such an application, and the power to take lands for the corporate purposes is found clearly to exist in the charter and general law, and the purpose stated is one within the contemplation of the legislative act, this court will not interfere with the conclusions of the Supreme Court as to the necessity for taking the land, if reached after due proceedings as prescribed; its review will be confined to those questions which relate to the validity and legality of the proceedings. *Id.*

10. The act of 1873 (Chap. 647, Laws of 1873), requiring the B. S. & F. R. R. Co., a street railroad corporation organized under the General Railroad Act (Chap. 140, Laws of 1850), to pay into the treasury of the city of New York one per cent of the gross receipts instead of a license fee as before prescribed (Chap. 199, Laws of 1873), is constitutional; it must be deemed an alteration and amendment of the charter of the company, and so is within the power reserved to the legislature by the general act, the provisions of the Revised Statutes to which corporations organized under said act are by its terms

made subject and the state Constitution. (Art. 8, § 1.) *Mayor, etc., v. Twenty-third St. R. R. Co.* 811

11. The said company leased its property rights, privileges and franchises to the defendant. There was nothing in the lease imposing upon the lessee the obligation to pay the percentage. In an action to compel such payment, *held*, that while no such obligation was imposed by the acts authorizing said company to lease its road (Chap. 199, Laws of 1873; chap. 389, Laws of 1875) or by any statute, defendant upon taking the place of its lessor, as to its charter rights and power, took its place also, as to its charter obligation and duties, and was not entitled to exercise the former without discharging the latter, and that, therefore, the action was maintainable. *Id.*

12. The duty of active vigilance required of persons going upon railroad tracks must be adapted to the circumstances of the case, and when the company, by its own conduct and its published regulations, has led the public to believe trains will not be run upon its tracks at specified times and places, persons having occasion to cross them have the right to rely upon these assurances, and are not necessarily guilty of negligence when injured by prohibited trains while doing so. *Parsons v. N. Y. C. & H. R. R. Co.* 355

13. In an action to recover damages for alleged negligence causing the death of M., plaintiff's testator, these facts appeared: M. was a passenger on one of defendant's trains going north; he got out at a way-station on the west side of the track, walked quite rapidly to the north a short distance by the side of the train, and then, in attempting to cross a track to the west, was struck and killed by a freight engine which was moving rapidly backward. When he saw the engine he attempted to jump from the track, but failed to escape. The accident occurred within the station-yard upon grounds where passengers were accustomed to

- pass and re-pass in going to and from trains. Defendant's rules require freight trains to approach stations slowly and to stop before reaching a station, at which a passenger train is landing or receiving passengers. The freight train was visible from the station at the distance of about three hundred feet, but was partially concealed from view by a curve in the road and by trusses on a bridge which it crossed before reaching the station, and about twenty feet south of which the decedent was killed. No one saw the engine approaching until it got upon the bridge. The freight train was moving about forty feet a second; not more than ten seconds elapsed between the time M. alighted and when he was struck. During this time the engine of the passenger train was blowing off steam, making a loud noise. *Held*, that the case was properly submitted to the jury and the evidence justified a verdict for plaintiff; that M., having once looked when he alighted and seeing no train, had a right to assume none would be coming at such a rate of speed as would preclude him from crossing the track; also, that it was immaterial whether M. when he alighted ceased to be a passenger or not. *Id.*
14. Defendant claimed and gave evidence tending to show that the engineer in charge of the freight engine attempted to stop the train on approaching the station, by reversing the lever and shutting off steam, but was temporarily disabled from controlling it by a blow received from the lever, which slipped from its position after being reversed and struck him. Expert testimony was given tending to show that such an accident could not occur if the lever was properly reversed except from a defective appliance. *Held*, that the fact that the engineer was thus disabled did not excuse defendant from the charge of negligence. *Id.*
15. *It seems* a passenger on a railroad train does not lose his character as such by alighting at a regular station, although he has not yet arrived at the terminus of his journey. *Id.*
16. An action against a railroad corporation to recover the amount of interest coupons upon bonds issued by another similar corporation, based upon an agreement between the two companies, by which defendant has become liable for their payment, is not an action "founded upon a note or other evidence of debt, for the absolute payment of money" within the meaning of the provision of the Code of Civil Procedure giving to such an action against a corporation a preference upon the calendar. (§ 791, sub. 8.) *Pothemus v. P. R. R. Co.* 617
17. Nor do the facts, upon which such an action is based, furnish a reason for giving it a preference, by the court, in the exercise of its discretion; plaintiff stands in no better position than ordinary litigants. *Id.*
18. The neglect of the employes of a railroad company to ring the bell or blow the whistle of an engine approaching a crossing does not excuse a traveler on the highway from exercising care on his part, in looking and listening before crossing the railroad tracks, in order to escape the danger of moving trains. *Cullen v. Prest., etc., D. & H. C. Co.* 687
- *The act of 1873 (Chap. 185, Laws of 1873), authorizing a corporation organized under the act of 1868 (Chap. 842, Laws of 1868), for the purpose of transmitting letters, packages, etc., by means of pneumatic tubes, to transform itself into a railroad corporation, unconstitutional.*
See Astor v. N. Y. A. R. Co. 98

RECEIVER.

In an action to dissolve a law firm, determine its assets and procure a sale of them and a settlement of the partnership affairs, the complaint alleged that certain abstracts of title to real estate in New York and New Jersey were part of the assets. The

answer denied the ownership by the firm of said abstracts. An order was made, under objection by defendants, appointing a receiver *pendente lite* and directing him to take possession, among other things, of the abstracts of title in possession of said firm, and, within fifteen days after his qualification, to expose to sale, and sell, the same, although no special or immediate necessity for their sale was shown by the papers. *Held*, error, as by this order the court determined a material issue upon affidavits in anticipation of the trial and the determination of the issues joined; that the abstracts ought to remain in possession of the receiver, free of access to all parties, until the trial and ultimate determination of the rights of the respective parties. *Brush v. Jay.* 483

RECOVERY OF POSSESSION OF PERSONAL PROPERTY.

See CLAIM AND DELIVERY.

REFERENCE.

1. Where, in an action for the dissolution of a copartnership and for an accounting, an order was entered by consent referring it to a referee named to hear and determine the issues, to take and state the accounts and report the amount for which judgment should be entered in favor of either party against the other, and where, upon the report of the referee, which did not contain separate findings of law and of fact as required by the Code of Civil Procedure (§ 1023) and was otherwise informal and incomplete, an interlocutory judgment was entered, *held*, that the Supreme Court had power to set aside the report and the judgment, and with the exercise of its discretion in this respect this court could not interfere; but that in the absence of allegations of misconduct on the part of the referee the Supreme Court had no power to set aside the order of reference and all proceedings under it and to refer the

case to a new referee to try the same, *de novo*, but should have sent the case back to the referee; also, that a provision in the order that the evidence already taken might, by the consent of both parties, be read before the new referee, did not validate it. *Maicas v. Leony.* 619

2. *It seems*, if the referee committed any errors of law or fact, the remedy was by appeal from the judgment entered upon his report. *Id.*

RELIGIOUS CORPORATIONS.

1. The provision of the Revised Statutes (1 R. S. 388, § 4, sub. 7), exempting from taxation "the personal property of every incorporated company not made liable to taxation on its capital in the fourth title" of the chapter containing it, does not include an incorporated college or religious society. *Callin v. Trustees, etc.* 183
2. A religious society, therefore, incorporated under the general act of 1813 (Chap. 60, Laws of 1813), providing for the incorporation of such societies, and a college not specially exempted from taxation by its charter or some special act, are included in the provision of the collateral inheritance tax act (Chap. 713, Laws of 1887), which subjects to the tax imposed by the act all property which shall pass by will to any "body, politic or corporate * * * other than to * * * the societies, corporations and institutions now exempted by law from taxation." *Id.*

REMAINDERS.

See WILLS.

REMEDIES.

1. Money in the hands of one person to which another is equitably entitled, may be recovered by the latter in a common-law action for

money had and received, subject to the restriction that the mode of trial and the relief which can be given in a legal action is adapted to the exigencies of the case and is capable of adjustment in such an action without prejudice to the interests of other parties. *Roberts v. Ely.* 128

2. No privity of contract is required to sustain such an action, except that which results from the circumstances, and it is immaterial whether defendant's original possession was rightful or wrongful. *Id.*

3. The fact that the relation between the parties has a trust character does not, *ipso facto*, in all cases, exclude the jurisdiction of a court of law. *Id.*

4. So long as the purchaser of lands remains in possession under his deed he has no defense to an action for the purchase-price. His remedy in case of failure or defect in title is by action on the covenants in his deed or contract. *Kirtz v. Peck.* 222

5. In pursuance of an ante-nuptial agreement, T., defendant's testator, executed to plaintiff, his wife, an instrument, by which he agreed to pay to her \$10,000 at his death, provided she lived with him as his wife up to that time and faithfully performed the duties of that relationship. Subsequently the parties executed another instrument, by which plaintiff, in consideration of \$5,000 then paid to her by her husband, released and canceled the former agreement. In an action upon the original agreement, *held*, that while the later one, so long as it remained executory, could not have been enforced, yet having been executed, in the absence of any allegation of fraud, plaintiff was not entitled to be relieved therefrom; that having released her husband's obligation she could be reinstated in her rights under it only by a suit in equity instituted for that purpose. *Tallinger v. Mandeville.* 427

—When remedy for error com-

mitted by referee is by appeal, not by application to set aside report and order of reference.

See Maicas v. Leony. (Mem.) 619

REPLEVIN.

See CLAIM AND DELIVERY

SAVINGS BANKS.

1. J. deposited a sum of money with defendant in trust for E., his wife, plaintiff's testatrix. A pass-book was delivered to him. After the death of both husband and wife and the issuing of letters testamentary to plaintiff, he called with them at defendant's bank and demanded payment of the deposit; he was told by one of its officers that it would be paid to him when he came with the pass-book which was then in possession of the executor of J.; thereafter the latter presented the pass-book, together with proof of his appointment, and thereupon defendant paid the deposit to him on surrender of the pass-book. In an action to recover the sum deposited it appeared that plaintiff, after learning of the payment, brought suit against J.'s executor to recover the money so paid and recover judgment therein, and being unable to collect the same, brought this action. *Held* (RUGER, Ch. J., dissenting), that plaintiff had an election of remedies, *i. e.*, either an action against defendant to recover the deposit, or an action against J.'s executor for money had and received; but he was not entitled to both, and by electing the latter remedy he lost the former, as by so doing he adopted and ratified the action of defendant in making the payment, and this would be a good defense in an action by defendant against J.'s executor to recover back the money paid to him. *Fowler v. Bowery Savings Bk.* 450

2. *It seems* that if the money had been left on special deposit, plaintiff could have pursued it in the hands of said executor without

losing his remedy against defendant. *Id.*

3. The defense that the payment by the bank had been adopted and ratified by plaintiff was not set up in the answer. This objection was not raised upon the trial, and all the facts pertaining to such defense were proved without objection and were found by the court. *Held*, that the objection was not available here. *Id.*

SPECIFIC PERFORMANCE.

1. In proceedings to compel a purchaser at a partition sale to complete his purchase, it appeared that R. formerly owned an undivided seven-tenths of the land in question; he conveyed two-tenths, and thereafter executed a deed which purported to convey his remaining interest, and under this deed the parties claimed title to one-half. It appeared, however, that the intent was to convey but two-tenths. *Held*, that, as the deed was liable to be reformed as against all the parties, it was to be assumed that the reformation might occur, and, therefore, in this respect the title was defective. *Scholle v. Scholle*. 261
2. The will of R., after giving certain specific legacies, gave to his executors his residuary estate in trust, with power to receive the rents and profits, sell and convey the property, invest both the rents and profits and proceeds of sale "and to divide and apply the same and income thereof" as directed, *i. e.*, to apply the income of two-sixths of "said residue and remainder" to the use of his wife for life, with remainder over to his children, and to apply the income of one-sixth to each of his four children during life, with remainder over to the issue of such child, and with authority to advance to each child a specified sum out of the principal if the executors should deem best. In the gift of the legacies the testator used the words "give and bequeath," in those of the residuary estate the words used were "devise and bequeath." *Held*, that the final and ultimate division did not require a conversion of the land into money, nor was such a conversion required as respects the intermediate income; that, therefore, the remaindermen took a vested interest in the lands; and that the interests of the grandchildren were not cut off by a foreclosure suit, to which they were not made parties. *Id.*
3. When the mortgage which was foreclosed was assigned to S., the plaintiff in the foreclosure suit, R. guaranteed the payment of one-half thereof. After R.'s death S. presented a claim to his executrix, who alone qualified and acted, for one-half, which was disputed. S. then began the foreclosure; the executrix was made a defendant and answered. Pursuant to an arrangement between her and S. she withdrew her answer and executed a deed to S. of R.'s entire interest. S. in return withdrew his claim against the estate and on the foreclosure sale bid in the property for the full amount of the mortgage. *Held*, that the deed was not a good execution of the power of sale and was invalid, as there was no sale such as the will contemplated, but an appropriation of the land to pay a debt, chargeable primarily upon the personal property, without an order of the surrogate, or proof that the personalty was insufficient to pay debts; also, that the surrogate was powerless to appropriate the land to the payment of debts except in the statutory method. *Id.*
4. Accordingly *held*, that the title proffered was defective and the purchaser was not bound to complete his purchase. *Id.*
5. Where a stipulation between the parties to discontinue an action in the Marine Court of the city of New York and that a judgment therein shall be discharged and vacated of record had been lost, *held*, that the judgment-debtor could maintain an action to establish and compel the specific performance of the contract; that,

- assuming such debtor had a remedy by motion in the Marine Court, as to which *quære*, this was no defense to the action. *Deen v. Milne*. 808
6. It is not a fatal obstacle to a suit for a specific performance that the contract does not relate to lands. *Id.*
7. In such an action it appeared that, upon the trial of an action brought by the defendant against the plaintiff in the Supreme Court, the court held that the Marine Court judgment was a bar, and that to remove the obstacle the parties entered into the stipulation to discontinue. *Held*, that there was a sufficient consideration for the agreement. *Id.*
8. *It seems* an agreement to discontinue an action includes, as a necessary consequence the vacation of a judgment, either interlocutory or final, entered therein. *Id.*
9. Mere delay for a period, short of that prescribed by the statute of limitations, does not necessarily bar the action for specific performance of such an agreement; it must appear that changes have taken place and circumstances occurred, rendering it inequitable to enforce the performance. *Id.*
10. In an action to compel the specific performance of a contract on the part of defendant to purchase certain property situate in the county of New York, these facts appeared: C. died intestate in Indiana, in 1845, seized of the premises. In 1860 one P., a creditor of C., obtained letters of administration of his goods, etc., from the Surrogate's Court of Richmond county. The petition upon which the letters were granted stated that C. "died possessed of personal property in the state of New York." Subsequently, and before letters were issued, the petitioner presented an affidavit showing the existence of assets in Richmond county. The letters recited that C. left assets unadministered in said county. P. subsequently made due application for authority to mortgage, lease or sell the real estate of C. for the payment of his debts, and in 1861, such authority having been granted, the premises in question were sold to plaintiff's testator, A., who died in 1872. In 1886 the agreement in question was executed between his executors and defendant. Defendant objected to the title that the Surrogate's Court did not acquire jurisdiction to issue letters to P. as administrator of C., and that the proceedings instituted by P. for a sale of the real estate were defective and ineffectual to confer any title to the land. *Held*, untenable; that the statutory requirement of assets in the county was met by the petitioner; that the recital in the letters was *prima facie* evidence of the existence of the facts stated, and the record showed that the necessary facts were alleged and proved upon which the surrogate acted in granting them; that his determination upon the proofs, however erroneous, cannot be disturbed by an attack upon it in a collateral proceeding. *O'Connor v. Huggins*. 511
11. It was claimed, and it appeared, that the order to show cause why a sale should not be had was made returnable one day later than the time limited by statute, which requires all persons interested to appear at a time and place specified, "not less than six weeks nor more than ten weeks from the time of making such order." (2 R. S. 107, § 5.) *Held*, that there was no substantial departure from the requirements of the statute; that if there was an irregularity, it was not one which abridged the rights of anyone, and was not a jurisdictional defect. *Id.*
12. The trial judge found, upon sufficient evidence, that plaintiff's testator had been in continual occupation and possession of the premises in question under a claim of title founded upon deeds from 1851; that the lands had been protected by a substantial enclosure; that plaintiffs and their testator had paid the taxes and assessments upon the same. After testator's

death the plaintiffs had rented the premises. There was no proof or pretense of any other claim to the property lying either in grant or in claim. *Held*, that a valid grant must be presumed as arising from an exclusive and uninterrupted possession under a claim of title founded on a conveyance for more than twenty years; that such a presumption will always displace objections based on flaws in the proceedings in which the title has had its source and protect it from being injured by their disclosure.

Id.

18. The time for the completion of the purchase was extended by mutual consent to January 17, 1887. *Held*, that interest on the purchase-money should be computed from that time only. *Id.*

STATUTES.

- *Chap. 842, Laws of 1868.*
- *Chap. 508, Laws of 1874.*
- *Chap. 185, Laws of 1876.*
- *Chap. 454, Laws of 1881.*
- *Chap. 312, Laws of 1886.*
- See Astor v. N. Y. Arcade R. Co.*, 93.
- *Chap. 60, Laws of 1818.*
- *Chap. 654, Laws of 1853.*
- *Chap. 456, Laws of 1857.*
- *Chap. 713, Laws of 1887.*
- 1 R. S. 888, § 4, *subd.* 7.
- See Catlin v. Trustees Trinity College*, 183.
- *Chap. 321, Laws of 1877.*
- See Phelan v. N. W. Mut. L. Ins. Co.*, 147.
- *Chap. 872, Laws of 1849*, § 2.
- 1 R. S. 728, § 55, *subd.* 8. *Id.* 732, § 78; *Id.* 733, § 55, *subd.* 3.
- See Genet v. Hunt*, 158.
- *Chap. 483, Laws of 1885.*
- *Chap. 713, Laws of 1887.*
- See In re Enston*, 174.
- *Chap. 350, Laws of 1866.*
- *Chap. 410, Laws of 1882*, § 827.
- *Chap. 397, Laws of 1883.*
- 1 R. S. 888, § 4, *subd.* 8.
- See Y. M. C. A. v. Mayor, etc.*, 187.
- 1 R. S. 727, § 471.
- See Asche v. Asche*, 282.
- *Chap. 606, Laws of 1875.*
- See In re Un. El. R. R. Co.*, 275.
- *Chap. 246, Laws of 1839.*
- See Mayor, etc., v. Carleton*, 284.

- *Chap. 140, Laws of 1850.*
- *Chap. 199, Laws of 1878.*
- *Chap. 647, Laws of 1878.*
- *Chap. 889, Laws of 1875.*
- See Mayor, etc., v. Twenty-third St. R. Co.*, 311.
- 2 R. S. 87, § 27.
- See Smith v. Cornell*, 320.
- 2 R. S. 66, § 52.
- See In re Wells*, 396.
- *Chap. 388, Laws of 1870*, § 87.
- See Mayor, etc., v. Sonneborn*, 423.
- 1 R. S. 736, § 40.
- See In re Crossman*, 503.
- 2 R. S. 80, § 56; *Id.* 107, § 5.
- See O'Connor v. Huggins*, 511.
- *Chap. 314, Laws of 1858*, § 1.
- See Harcey v. McDonnell*, 526.
- *Chap. 410, Laws of 1882*, § 86, *subd.* 4.
- See Cohen v. Mayor, etc.*, 532.
- *Chap. 84, Laws of 1871.*
- See In re Crawford*, 560.
- *Chap. 498, Laws of 1887.*
- See People v. Kelly*, 647.
- *Chap. 205, Laws of 1888.*
- See Perkins v. State of N. Y.*, 660.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STIPULATION.

1. Where a stipulation between the parties to discontinue an action in the Marine Court of the city of New York and that a judgment therein shall be discharged and vacated of record had been lost, *held*, that the judgment-debtor could maintain an action to establish and compel the specific performance of the contract; that, assuming such debtor had a remedy by motion in the Marine Court, as to which *quære*, this was no defense to the action. *Deen v. Milne*. 303
2. In such an action it appeared that, upon the trial of an action brought by the defendant against the plaintiff in the Supreme Court, the court held that the Marine Court judgment was a bar, and that to remove the obstacle the parties entered into the stipulation to discontinue.

Held, that there was a sufficient consideration for the agreement.

Id.

STREETS.

See HIGHWAYS.

SUBROGATION.

Where the purchaser of the equity of redemption of mortgaged premises, who is under no personal liability to pay the mortgaged debt, pays it in aid of his own title, or procures its discharge by giving his own mortgage upon the premises in lieu thereof, as against the widow of his grantor who joined with her husband in the mortgage, but not in the deed, said grantee is entitled to the protection of the mortgagee's right as against the dower which is covered and charged by the mortgage. The purchaser takes his land charged as surety for the mortgage debt, and having paid it, has the right, as against the mortgagors, to be subrogated to the position of the mortgagee and to stand in equity as the purchaser and holder of his security, and the widow seeking to enforce in equity her right of dower, is bound to allow her due proportion of the mortgage debt. *Everson v. McMullen*. 293

SUPERIOR COURT (N. Y. CITY).

The Special Term of the Superior Court of the city of New York has the power to suspend, by order, the operation of a judgment rendered by it in an equity case, or to relieve the defendant from the duty of immediate obedience pending an appeal to this court, where the appeal does not of itself relieve, and a mere order staying proceedings on the part of plaintiff would not effect that purpose. *Genet v. Prest., etc., D. & H. O. Co.* 472

SUPREME COURT.

1. Where no undertaking has been filed or served upon appeal to this court, the Supreme Court has no power to grant an order allowing the appellant to perfect his appeal by filing an undertaking. *Nelson v. Tenney*. 616
2. Where, in an action for the dissolution of a copartnership and for an accounting, an order was entered by consent referring it to a referee named to hear and determine the issues, to take and state the accounts and report the amount for which judgment should be entered in favor of either party against the other, and where, upon the report of the referee, which did not contain separate findings of law and of fact as required by the Code of Civil Procedure (§ 1023), and was otherwise informal and incomplete, an interlocutory judgment was entered, *held*, that the Supreme Court had power to set aside the report and the judgment, and with the exercise of its discretion in this respect this court could not interfere; but that in the absence of allegations of misconduct on the part of the referee the Supreme Court had no power to set aside the order of reference and all proceedings under it and to refer the case to a new referee to try the same, *de novo*, but should have sent the case back to the referee; also, that a provision in the order that the evidence already taken might, by the consent of both parties, be read before the new referee, did not validate it. *Maicas v. Leony*. 619
3. As to whether relief will be given to an attorney, having a lien upon a judgment for his costs, against a fraudulent satisfaction thereof by his client upon a summary application by motion, or will require him to bring suit, is within the discretion of the Supreme Court, and its determination is not reviewable here. *Howitt v. Merrill*. 630

SURROGATES' COURTS.

1. Where, upon the trial of an issue

- of fact by a surrogate, the evidence on each side is so nearly balanced that a determination either way would not be reversed upon appeal, it may not be said that the losing party is not prejudiced by material testimony of an incompetent witness, given under objection and exception, and the admission of such testimony is error requiring a reversal. *In re Eysman*. 62
2. Where the probate of a will is contested on the ground of want of testamentary capacity on the part of the testator, and that the will was not duly executed, a legatee or devisee, who is not a subscribing witness, is not competent, under the Code of Civil Procedure (§ 829), to testify to personal transactions or communications with the decedent, preceding, attending or succeeding the execution of the will. *Id*.
 3. This rule excludes not only testimony of transactions directly between the witness and the deceased and communications made by the latter to the former, but of any transaction between the deceased and others, in any portion of which the witness participated, or any conversation in his hearing, although not with or addressed to him; also, any testimony as to the acts and conduct of the testator observed by the witness tending to show mental capacity. *Id*.
 4. The provision of said Code (§ 2544), providing that "a person is not disqualified or excused from testifying respecting the execution of a will by a provision therein whether it is beneficial to him or otherwise," refers only to the subscribing witnesses to a will, it does not operate as a repeal by implication, so far as it relates to testimony as to the execution of a will of the prohibitory clause above referred to, nor does it authorize or permit a beneficiary under the will to testify where, under the former clause, his testimony would be excluded. *Id*.
 5. Although Surrogates' Courts are courts of special and limited jurisdiction, where jurisdiction to act exists their orders or decrees are conclusive until they are revoked or reversed on appeal. (2 R. S., 80, § 56.) *O'Connor v. Huggins*. 511
 6. That conclusiveness, in the absence of fraud or collusion, attaches in a case where a jurisdictional fact is in question and it appears there was proof with respect to its existence, upon which the surrogate decided. *Id*.
 7. A surrogate is not confined to any form of procedure or mode of proof in acting upon an application for letters of administration, and may take proof by affidavit. *Id*.
 8. The administration of assets of the estate of a decedent is peculiarly within the cognizance of equity, and a Surrogate's Court, in adjusting the accounts of executors or administrators, is governed by principles of equity as well as of law; it is not prevented by any rule of law from doing exact justice to the parties, according to the equities, within the confines only of statutory provisions. *In re Niles*. 547
 9. V. died, leaving a widow but no children. His will, after a provision made for his wife, contained this clause: "This provision to be accepted by my wife in lieu of her dower right and distributive share in my estate, she to make her election, whether she accepts this provision of my will, within sixty days from the time of proving the same." The widow within the time specified made her election, rejecting the provision. The residuary estate was given to a nephew of the testator. In proceedings for the probate of the will, *held*, that, aside from her dower right, the widow was entitled to such share of the personal estate as the law would have given her had the deceased died intestate. *In re Vowers*. 569
 10. The executor claimed that the widow had no right to raise the question of construction, upon probate of the will, as it involved both real and personal estate. *Held*, untenable; that the widow simply

put in issue a disposition of personal property, and such a disposition the Code of Civil Procedure (§ 2624) permits a party to put in issue upon probate. *Id.*

SUSPENSION OF POWER OF ALIENATION.

1. The will of H., after authorizing and directing his executor to "partition, divide and apportion" his residuary estate among his children living at the time of such partition, and the issue of any child or children who had died leaving issue, provided as follows: "And I do hereby give, devise and bequeath to each of my said children the share or portion of my said estate so to be partitioned, divided and apportioned to them, respectively, as aforesaid. * * * If any of my children shall die without issue before such partition and division shall be made, then I give the portion of such deceased child equally to the brothers and sisters of such deceased child. * * * If any of my said children shall die leaving issue, then the child or children (who shall be living at the time of such partition) of such deceased child of mine shall take and have the share or portion which the parent would have if living. * * * It is my will that my executor make the partition * * * as soon after my decease as practicable, having reference to the condition of my estate; but as he may find it necessary to realize upon securities, and sell and convert into money both real and personal property, * * * which he may not be able speedily to make without sacrifice and loss to my estate, he shall not be compelled to make such partition, etc., * * * until after the lapse of five years from the probate of this will." The executor was directed, until the partition of the estate, to pay \$2,400 per annum to each of the children from the testator's decease, and to charge the payment to the child as part of his or her share of the estate.

The executor was authorized to take entire charge of all the real and personal estate, to lease, collect rents, insure, repair, make investments, pay taxes, etc. All of the testator's children were living and of full age at the time of his decease. In an action for the construction of the will, *held*, that no unlawful perpetuity was created by authorizing the executor to delay partitioning the estate for five years, as the power of sale was not suspended; and that there was no equitable conversion of the realty into personalty, the power of sale not being absolute. *Henderson v. Henderson.* 1

2. Also, *held*, that the provision restricting the limitation over to such of the issue of a deceased child as "shall be living at the time of such partition," was void, as it would prevent the absolute vesting of the share in the issue of a deceased child at the time of the parent's death; but as it was inconsistent with the earlier provisions of the same clause, and unnecessary, so far as the perfecting of a testamentary scheme for disposing of the residuary estate is concerned, it should not be allowed to prevail over the preceding direction, when by cutting it off and disregarding it as a void direction, the will could be effectuated according to the plain and just intent of the testator. *Id.*
3. If the principal disposition of a will can be upheld, ulterior, contingent limitations, which threaten violation of statutory rules respecting the ownership of property, if separable from the principal dispositions, may and should be disregarded. *Id.*
4. In 1853, C., in contemplation of marriage, executed a trust deed of all her estate, real and personal, to certain trustees to hold the same during coverture or until her death, if she should "not survive her said coverture," and apply the profits and income "as received, and not by anticipation," to her sole and separate use. In case of her death during coverture the

deed provided that the trustees should convey and deliver all the trust estate remaining to such devisees and in such shares as she should by will direct, and in default of any such direction unto such person or persons "being her heir or heirs-at-law as would be entitled to take the same by descent from her in case the same was land belonging to her, situate in the state of New York." The contemplated marriage took place, and C. died during coverture, leaving two children, the issue of the marriage, surviving her, also leaving a will, by which she gave all of her estate to the executors in trust, to apply the rents and profits to the maintenance of, or pay the same over to her children in equal parts during their lives, with remainder, on the death of either, of his share, to his heirs and next of kin. In case of the death of either child during minority and without issue, the whole estate to be held in trust for the survivor during life, with remainder to his heirs and next of kin. In case of the death of both children during minority and without issue, the whole estate was given absolutely to designated beneficiaries. In an action for the construction of the will, *held*, that the trust deed created a valid trust (1 R. S. 728, § 55, sub. 3), which neither the settlor alone, nor in conjunction with the trustees, could abrogate; that the power of disposition reserved in the deed was not an absolute power equivalent to absolute ownership (1 R. S. 733, § 85); that the will, therefore, was not an exercise by the testatrix of the "*jus disponendi*" incident of ownership, but simply the execution of a power of appointment, and therefore the question as to the validity of the trusts in the will was to be considered in view of the trust deed and the statute of powers (1 R. S. 732, § 78 *et seq.*), and the period during which the right of alienation might be suspended was to be computed "from the time of the creation of the power" (§ 123), and so considered the trusts created by the will were in contravention of the statute against perpetuities

as they were limited upon and made possible a suspension of the power of alienation of the real estate and the absolute ownership of the personal property for three lives, two of them not in being at the time of the creation of the power. *Genet v. Hunt.* 158

5. The will of D., and a codicil thereto, gave his residuary estate to his executors in trust, to apply it, or the proceeds of sale, which they were empowered to make, to the establishment and endowment of a charitable institution, whose object and the class of persons to be relieved and benefited thereby should be the same as a charitable institution named. The executors were authorized and directed to apply for and obtain from the state legislature, "as early as practicable," an act of incorporation of such an institution, and to do this, if possible, within ten years after his decease. In the event that the gift "should be adjudged or proved invalid or its execution be impossible, either by judicial decision or from any other cause," the testator directed that all his residuary estate should be sold and the proceeds equally divided among certain existing religious and charitable corporations named, all of whom had capacity to take. In an action for the construction of the will, *held*, that the primary gift was invalid, as there was contemplated a period measured by years, not by lives, during which there would be no person in existence by whom an absolute estate in possession could be conveyed, and so there was an unlawful suspension of the power of alienation; also, that the gift was not saved by the fact that an institution, such as contemplated by the testator, could have been incorporated under the general law, as such a corporation was not intended or directed, but one formed under a special charter; also, that if the will should be construed as working an equitable conversion of the real estate into personalty this would not affect the question, because considering it as personalty, the prohibition of the statute against a suspension of the abso-

lute ownership of personal property for more than two lives, would apply. *Cruikshank v. Home for Friendless.* 337

TAXATION.

See ASSESSMENT AND TAXATION.

TRIAL.

1. A party must allege, as well as prove, the facts constituting his cause of action, and a recovery upon a cause of action, not alleged in the complaint, although proved under objection and exception on the trial, is not sustainable. *Clark v. Post.* 17
2. Where a complaint presents a proper case for equitable jurisdiction the fact that the possible result of the action may be a personal judgment does not oust the court of jurisdiction, or entitle the defendant to a jury trial. *Van Rensselaer v. Van Rensselaer.* 207
3. Where, upon a jury trial, each party asks that a verdict be ordered in his favor and neither asks to go to the jury upon any question of fact, the court is authorized to find upon the facts, and if there is any evidence to sustain its findings, it is conclusive here; by requesting the court to determine the case as one of law, a party waives his right, if any, to go to the jury. *Kirtz v. Peck.* 222
4. Where illegal evidence has been received without objection, the remedy of the party is by motion to strike it out; an objection to its reception and an exception is not available. *Parsons v. N. Y. C. & H. R. R. R. Co.* 355
5. In an action by an executor to recover damages for the alleged conversion of certain promissory notes, it was conceded that the notes, before the death of plaintiff's testatrix, belonged to her, and that thereafter defendant had possession of them. The issue was as to whether she gave them to him or

whether he wrongfully became possessed thereof. Plaintiff, as a witness in his own behalf, testified that a few hours before the death of decedent, when she was in an unconscious state, which continued until her death, he saw the notes in her trunk; that just after her death he looked again and they were gone, and that defendant was in the house and had an opportunity to take them. Defendant, as a witness in his behalf, was permitted to testify that he had possession of the notes a week before the death of decedent, and that they were in his possession when the executor testified he saw them in the trunk; he was then asked: "Did you take them (the notes) from any person without their consent?" This was objected to as incompetent, under the Code of Civil Procedure (§ 829), and was excluded. *Held*, that if the ruling was erroneous, as the testimony was only proper in rebuttal, not to establish an affirmative defense, and as defendant, if believed, had already thoroughly and perfectly rebutted plaintiff's evidence, the error did not justify a reversal. *Lewis v. Merritt.* 386

6. *It seems* that plaintiff's testimony tended to establish that there had been no personal transaction between deceased and defendant by which his possession could have been rightful, and it was thereby made competent for defendant to testify that he took the notes with her consent, and so rightfully. *Id.*
7. The court, in submitting the question as to whether there was a gift as claimed by defendant, charged repeatedly that such a gift must be proved "beyond suspicion." *Held*, error. *Id.*
8. While the proof to establish an alleged gift *causa mortis* must be clear and convincing, it is not correct to charge the jury that the presumptions of law are against it, or that the fact of the gift must be proved beyond suspicion. *Id.*

— A defense of failure to perform a condition, not available unless set up in answer.
See Kirtz v. Peck. 222

—When defense not set up in answer is proved without objection on trial, objection may not be raised on appeal.

See *Flouder v. B. S. Bank.* 450

See GENERAL TERM.

SUPERIOR COURT (N. Y. CITY).

TRUSTS AND TRUSTEES.

1. The will of H., after authorizing and directing his executor to "partition, divide and apportion" his residuary estate among his children living at the time of such partition, and the issue of any child or children who had died leaving issue, provided as follows: "And I do hereby give, devise and bequeath to each of my said children the share or portion of my said estate so to be partitioned, divided and apportioned to them, respectively, as aforesaid. * * * If any of my children shall die without issue before such partition and division shall be made, then I give the portion of such deceased child equally to the brothers and sisters of such deceased child. * * * If any of my children shall die leaving issue, then the child or children (who shall be living at the time of such partition) of such deceased child of mine shall take and have the share or portion which the parent would have if living. * * * It is my will that my executor make the partition * * * as soon after my decease as practicable, having reference to the condition of my estate; but as he may find it necessary to realize upon securities, and sell and convert into money both real and personal property, * * * which he may not be able speedily to make without sacrifice and loss to my estate, he shall not be compelled to make such partition, etc., * * * until after the lapse of five years from the probate of this will." The executor was directed, until the partition of the estate, to pay \$2,400 per annum to each of the children from the testator's decease, and to charge the payment to the child as part of his or her share of the estate. The execu-

tor was authorized to take entire charge of all the real and personal estate, to lease, collect rents, insure, repair, make investments, pay taxes, etc. All of the testator's children were living and of full age at the time of his decease. In an action for the construction of the will, held, that no valid express trust was created by the will, and the legal title to the real estate vested in the testator's children at his death, subject to the power given the executor to partition; that the direction to partition, etc., although ineffectual to create a valid trust, could be upheld as a power in trust. *Henderson v. Henderson.* 1

2. A trust estate will not be implied when to do so will make the will conflict with the statute, and when the duties imposed upon the executor may be executed under a trust power. *Id.*

3. In 1853, C., in contemplation of marriage, executed a trust deed of all her estate, real and personal, to certain trustees to hold the same during coverture or until her death, if she should "not survive her said coverture," and apply the profits and income "as received, and not by anticipation," to her sole and separate use. In case of her death during coverture the deed provided that the trustees should convey and deliver all the trust estate remaining to such devisees and in such shares as she should by will direct, and in default of any such direction unto such person or persons "being her heir or heirs-at-law as would be entitled to take the same by descent from her in case the same was land belonging to her, situate in the state of New York." The contemplated marriage took place, and C. died during coverture, leaving two children, the issue of the marriage, surviving her; also leaving a will, by which she gave all of her estate to the executors in trust, to apply the rents and profits to the maintenance of, or pay the same over to, her children, in equal parts during their lives, with remainder, on the death of either, of his share, to his heirs and next of kin. In case of the death of

either child during minority and without issue, the whole estate to be held in trust for the survivor during life, with remainder to his heirs and next of kin. In case of the death of both children during minority and without issue, the whole estate was given absolutely to designated beneficiaries. In an action for the construction of the will, *held*, that the trust deed created a valid trust (1 R. S. 728, § 55, sub. 3), which neither the settlor alone, nor in conjunction with the trustees, could abrogate; that the power of disposition reserved in the deed was not an absolute power equivalent to absolute ownership (1 R. S. 733, § 85); that the will, therefore, was not an exercise by the testatrix of the "*jus disponendi*" incident of ownership, but simply the execution of a power of appointment, and therefore the question as to the validity of the trusts in the will was to be considered in view of the trust deed and the statute of powers (1 R. S. 732, § 78 *et seq.*), and the period during which the right of alienation might be suspended was to be computed "from the time of the creation of the power" (§ 128), and so considered the trusts created by the will were in contravention of the statute against perpetuities as they were limited upon and made possible a suspension of the power of alienation of the real estate and the absolute ownership of the personal property for three lives, two of them not in being at the time of the creation of the power. *Genet v. Hunt*. 158

4. Also, *held*, that the difficulty was not removed by the provision of the Married Woman's Act (§ 2, chap. 375, Laws of 1849), providing that a trustee holding any property for a married woman may convey the same to her, on her written request, accompanied by a certificate of a justice of the Supreme Court that he has examined the property and made due inquiry as to the capacity of the married women to manage and conduct the same; that, assuming the trust in question was within that act, the disability imposed upon the trustee of an express

trust by the general statute was not removed until the prescribed certificate was obtained; but *held*, that the act did not apply; that it was applicable only to nominal trusts, the sole object of which was to secure a married woman in the enjoyment of her separate estate. *Id.*

5. Where a trustee is bound to pay money to a beneficiary as a debt, if he makes payment to another person, this is not a payment of the debt and the moneys paid are not the property of the beneficiary. *Fowler v. Bowers Sav. Bk.* 450
6. In such case the beneficiary may ignore the payment and sue the trustee as his debtor, or he may ratify and adopt the payment and sue the person who received the money, but he cannot do both, and his election, once effectually made, is conclusive upon him. *Id.*
7. He who holds a position of trust jointly with others cannot remain passive, when he knows of irregular acts of his associates, without incurring responsibility for such acts. *In re Niles*. 547
8. Where a will gave the testator's residuary estate to his executors in trust, with authority to sell the real estate and to divide the whole into specified parts, each to be kept invested and the income paid to a beneficiary named during life, *held*, that upon the division, the duties of the executors, as such, ceased, and they held the property as trustees; and so, they were entitled to double commissions. *In re Crawford*. 560

UNDERTAKING.

Where no undertaking has been filed or served upon appeal to this court, the Supreme Court has no power to grant an order allowing the appellant to perfect his appeal by filing an undertaking. *Nelson v. Tenney*, 616

— When, on motion to compel appellant to file a new undertaking, the

court will not permit an undertaking for costs only.

See Beeman v. Banta (Mem.). 615

USE AND OCCUPATION.

Before a recovery can be had in an action for use and occupation of real estate, it must be made to appear that the conventional relation of landlord and tenant existed between the parties; and while the possession and beneficial enjoyment of real property, with the consent of the owner, is ordinarily sufficient to sustain an action upon an implied agreement for use and occupation, such an agreement may not be implied where the circumstances attending the use and occupation show clearly there was no expectation of rent by either party.

Collyer v. Collyer. 442

WAIVER.

Where, upon a jury trial, each party asks that a verdict be ordered in his favor and neither asks to go to the jury upon any question of fact, the court is authorized to find upon the facts, and if there is any evidence to sustain its finding, it is conclusive here; by requesting the court to determine the case as one of law, a party waives his right, if any, to go to the jury.

Kirts v. Peck. 223

WARRANTY.

1. Where, upon sale of real estate by an assignee in bankruptcy, the notice and conditions of sale were attached together and signed by the parties, *held*, that they constituted a memorandum by which both were bound; and that prior negotiations and oral agreements were merged therein; also, that there was an implied warranty that the vendor had a good title, but that this warranty existed only so long as the contract remained executory, and as the terms of sale required a conveyance without warranty or personal covenant, but

simply sufficient to pass whatever right the vendor had in the lands upon delivery of the deed, the covenant implied in the contract was discharged, and the grantor thereafter was only bound by whatever covenants there were in the deed.

Clark v. Post. 17

2. The deed given by the assignee contained a recital of the various proceedings in bankruptcy which led to the appointment of the assignee; of the commencement of a suit by him as such assignee against S., wife of the bankrupt, who held the legal title of the real estate in question, to have such title adjudged invalid, and a conveyance of the premises to him in consideration of the discontinuance of such suit, "and other good and valid considerations." *Held*, that this did not make a warranty, either express or by way of covenant, that the recitals were true, or permit a recovery as for a breach on proof that the narration was false, as it was not material to the contract contained in the deed or an inducement to it. *Id.*

WIDOW.

1. L. died leaving a widow and no children. His will, after a devise of his residuary real estate to three persons named, his next of kin and heirs, who were non-resident aliens, contained a direction that said real estate be sold at auction by a referee appointed by the Supreme Court, the net proceeds to be deposited in court "in the same manner as money belonging to non-residents" for the use and benefit of the devisees "subject to the further order of the court." In an action for a construction of the will, it appeared that two of the devisees died before the testator; the court found that the gifts to them lapsed, and as to their portions the testator died intestate. The court also found that the direction for a sale worked an equitable conversion of the real estate into personalty and the portion so undisposed of was to be distributed as such; that is,

to the widow one-half and \$2,000 in addition. *Held*, error; that the direction for a conversion was simply for the purposes of the will, and while as to the non-resident aliens the doctrine of conversion would, if necessary, apply in their favor, if not required for that purpose, a conversion would not be presumed; and, so far as the widow was concerned, the property undisposed of, whether a sale was necessary or not, devolved according to its original character. *Parker v. Linden.* 28

2. The will of A. devised and bequeathed all his real and personal property, after the payment of debts and funeral expenses, to his executors, in trust, to invest and keep invested the proceeds in certain specified interest-bearing securities, to pay the income of a certain small part thereof to his mother during life, and the balance to his widow during life, including that bequeathed to the mother after her death, and after the death of the wife the remainder over to the testator's surviving children, share and share alike. In an action for the construction of the will, it appeared that the widow and two children survived him, one of whom died thereafter and before the commencement of the action. The widow claimed the benefit of the provision made for her in the will and also dower in the testator's real estate, and that upon the death of her child she, as next of kin, became entitled to one-half of the remainder provided for each child and to an absolute interest in possession of one-quarter of the estate by reason of a merger of her legal and equitable interest therein. *Held*, untenable; that the creation of a trust for her life was inconsistent with an implied right on her part to manage and control any part of the estate; that from the fact that the testator gave her the income of all his estate it was to be implied that he did not expect her also to take dower; and that the will indicated the testator's intent that all his property should be converted into money; that the widow's interest in the trust estate did not merge in that acquired on the death of her

child; that there could be no merger because of the existence of the trust estate. *Ascho v. Ascho.* 282

3. Where there is a manifest incompatibility between the provision for a widow in a will and dower, the widow is put to an election between them. *Id.*

4. Also, *held*, that the widow by the death of her child acquired a future estate, dependent upon the precedent estate of the trustees, which may be devised but cannot be enjoyed in possession; that it was the intent of the testator to put the corpus of the fund beyond the hazard of impairment and waste during the life of his widow, and this could not be defeated or affected by the acquisition by her of the estates in remainder. *Id.*

5. V. died, leaving a widow but no children. His will, after a provision made for his wife, contained this clause: "This provision to be accepted by my wife in lieu of her dower right and distributive share in my estate, she to make her election, whether she accepts this provision of my will, within sixty days from the time of proving the same." The widow within the time specified made her election, rejecting the provision. The residuary estate was given to a nephew of the testator. In proceedings for the probate of the will, *held*, that, aside from her dower right, the widow was entitled to such share of the personal estate as the law would have given her had the deceased died intestate. *In re Vowers.* 569

See DOWER.

WILLS.

1. The will of H., after authorizing and directing his executor to "partition, divide and apportion" his residuary estate among his children living at the time of such partition, and the issue of any child or children who had died leaving issue, provided as follows: "And I do hereby give, devise and bequeath to each of my said children the

share or portion of my said estate so to be partitioned, divided and apportioned to them, respectively, as aforesaid. * * * If any of my children shall die without issue before such partition and division shall be made, then I give the portion of such deceased child equally to the brothers and sisters of such deceased child. * * * If any of my said children shall die leaving issue, then the child or children (who shall be living at the time of such partition) of such deceased child of mine shall take and have the share or portion which the parent would have if living. * * * It is my will that my executor make the partition * * * as soon after my decease as practicable, having reference to the condition of my estate; but as he may find it necessary to realize upon securities, and sell and convert into money both real and personal property, * * * which he may not be able speedily to make without sacrifice and loss to my estate, he shall not be compelled to make such partition, etc., * * * until after the lapse of five years from the probate of this will." The executor was directed, until the partition of the estate, to pay \$2,400 per annum to each of the children from the testator's decease, and to charge the payment to the child as part of his or her share of the estate. The executor was authorized to take entire charge of all the real and personal estate, to lease, collect rents, insure, repair, make investments, pay taxes, etc. All of the testator's children were living and of full age at the time of his decease. In an action for the construction of the will, *held*, that no valid or express trust was created by the will, and the legal title to the real estate vested in the testator's children at his death, subject to the power given the executor to partition; that the direction to partition, etc., although ineffectual to create a valid trust, could be upheld as a power in trust. *Henderson v. Henderson*. 1

2. A trust estate will not be implied when to do so will make the will conflict with the statute, and when the

duties imposed upon the executor may be executed under a trust power. *Id.*

3. Also, *held*, that no unlawful perpetuity was created by authorizing the executor to delay partitioning the estate for five years, as the power of sale was not suspended; and that there was no equitable conversion of the realty into personalty, the power of sale not being absolute. *Id.*
4. Also, *held*, that one or more of the testator's children could not maintain an action for partition pending the existence of the right in the executor to exercise his power. *Id.*
5. Also, *held*, that the provision restricting the limitation over to such of the issue of a deceased child as "shall be living at the time of such partition," was void, as it would prevent the absolute vesting of the share in the issue of a deceased child at the time of the parent's death; but as it was inconsistent with the earlier provisions of the same clause, and unnecessary, so far as the perfecting of a testamentary scheme for disposing of the residuary estate is concerned, it should not be allowed to prevail over the preceding direction, when, by cutting it off and disregarding it as a void direction, the will could be effectuated according to the plain and just intent of the testator. *Id.*
6. If the principal disposition of a will can be upheld, ulterior, contingent limitations, which threaten violation of statutory rules respecting the ownership of property, if separable from the principal dispositions, may and should be disregarded. *Id.*
7. L. died leaving a widow and no children. His will, after a devise of his residuary real estate to three persons named, his next of kin and heirs, who were non-resident aliens, contained a direction that said real estate be sold at auction by a referee appointed by the Supreme Court, the net proceeds to be deposited in court "in the same manner as money belonging to non-residents" for the use and

benefit of the devisees, "subject to the further order of the court." In an action for a construction of the will, it appeared that two of the devisees died before the testator; the court found that the gifts to them lapsed, and as to their portions the testator died intestate. The court also found that the direction for a sale worked an equitable conversion of the real estate into personalty, and the portion so undisposed of was to be distributed as such; that is, to the widow one-half and \$2,000 in addition. *Held*, error; that the direction for a conversion was simply for the purposes of the will, and while, as to the non-resident aliens, the doctrine of conversion would, if necessary, apply in their favor, if not required for that purpose, a conversion would not be presumed; and, so far as the widow was concerned, the property undisposed of, whether a sale was necessary or not, devolved according to its original character. *Parker v. Linden*. 28

8. A general residuary clause, not circumscribed by clear expressions in other parts of a will, includes any property or interests of the testator which are not otherwise perfectly disposed of, and all that for any reason eventually fall into the general residue. *Riker v. Cornwell*. 115

9. The will of B., after various gifts to charitable societies and for specified benevolent purposes, contained a provision, by the terms of which, in case of a misnomer of any of the institutions named, or of their incapacity to take, she gave the sum constituting such ineffectual gift to her executors "to be applied to the charitable uses * * * indicated in such manner as they shall be able, giving the same, however, to them, absolutely relying on their carrying out substantially" the purposes of the testatrix. By the next clause she gave "all the rest, residue and remainder" of her estate, "including all void and lapsed legacies, if any, not carried by the terms of the preceding

clause" to six charitable societies named. A codicil, after various other bequests, named fourteen societies in addition to those specified in the residuary clause, which the testatrix directed should share in her residuary estate "remaining after the payment of all the legacies and carrying out all of the trusts and provisions" equally with those so specified, the testatrix declaring it to be her intention that the twenty societies should receive in equal shares the residue of her "personal and of the proceeds of her real estate." Following this was a clause, by which, if any of the gifts in the codicil should from any cause fail, the testatrix gave the amount of the bequest so failing to her executors "as joint tenants, absolutely in full confidence, that they * * * will dispose of such amounts" as the testatrix would have desired herself to do. In an action for the construction of the will, *held*, that its evident purpose was to leave no part of the estate undisposed of; that in no contingency could the next of kin of the testatrix take any benefit by reason of a legacy failing to take effect; that if the executors could not take the amount of any void or lapsed legacies, the same went into the residuary estate and passed to the legatees named in the residuary provisions, which included all the property the testatrix died possessed of which was not otherwise effectually disposed of. *Id.*

10. In 1853, C., in contemplation of marriage, executed a trust deed of all her estate, real and personal, to certain trustees to hold the same during coverture or until her death, if she should "not survive her said coverture," and apply the profits and income "as received, and not by anticipation," to her sole and separate use. In case of her death during coverture the deed provided that the trustees should convey and deliver all the trust estate remaining to such devisees and in such shares as she should by will direct, and in default of any such direction unto such person or persons "being her

heir or heirs-at-law as would be entitled to take the same by descent from her in case the same was land belonging to her, situate in the State of New York." The contemplated marriage took place, and C. died during coverture, leaving two children, the issue of the marriage, surviving her, also leaving a will by which she gave all of her estate to the executors in trust, to apply the rents and profits to the maintenance of, or pay the same over to her children in equal parts during their lives, with remainder on the death of either, of his share, to his heirs and next of kin. In case of the death of either child during minority and without issue, the whole estate to be held in trust for the survivor during life, with remainder to his heirs and next of kin. In case of the death of both children during minority and without issue, the whole estate was given absolutely to designated beneficiaries. In an action for the construction of the will, *held*, that the trust deed created a valid trust (1 R. S. 728, § 55, sub. 3), which neither the settlor alone nor in conjunction with the trustees, could abrogate; that the power of disposition reserved in the deed was not an absolute power equivalent to absolute ownership (1 R. S. 728, § 85); that the will, therefore, was not an exercise by the testatrix of the "*jus disponendi*" incident of ownership, but simply the execution of a power of appointment, and therefore the question as to the validity of the trusts in the will was to be considered in view of the trust deed and the statute of powers (1 R. S. 732, § 73 *et seq.*), and the period during which the right of alienation might be suspended was to be computed "from the time of the creation of the power" (§ 128), and so considered the trusts created by the will were in contravention of the statute against perpetuities as they were limited upon and made possible a suspension of the power of alienation of the real estate and the absolute ownership of the personal property for three lives, two of them not in being at the time of the creation of the power. *Genet v. Hunt.* 158

11. While, as a general rule, a will and codicil are to be construed as part of the same instrument, and a codicil is no revocation of a will further than it is so expressed, where the codicil contains directions, inconsistent with provisions of the will, the latter will be deemed revoked to the extent of the discordant dispositions, and so far as may be necessary to give effect to the provisions of the codicil. *Newcomb v. Webster.* 191

12. After the making of her will, the testatrix sold the principal real estate devised and acquired other real estate. She thereafter executed a codicil which, after providing for beneficiaries named in the will without any reference, however, to it, and also for new beneficiaries, gave all the rest and residue of her estate, real and personal, to certain beneficiaries named. It, by express provision, revoked so much of the will as was inconsistent with the codicil. In an action for the interpretation of the instruments, *held*, that all of the provisions of the will, save the clause appointing executors, were revoked by the codicil; but that, as said clause remained in force, both instruments were properly admitted to probate. *Id.*

13. G. died, leaving an estate of over \$4,000,000. By his will he bequeathed to his son T. \$1,000,000 to be paid within eighteen months after the testator's death. There was no provision for the payment of interest on this sum, or for the support of the legatee until it was paid. T. was at the time about twenty-seven years of age, in delicate health, and had always been supported by his father; he was not, however, absolutely incompetent to transact any business, and was named as one of the executors. His fees as executor, had he qualified, would have been largely in excess of any sum he had annually drawn from his father while living. *Held*, that T. was not entitled to any interest on the legacy previous to the expiration of the time fixed for its payment. *Thorn v. Garner.* 198

14. The business carried on by the testator had been conducted under the name of G. & Co. The business was continued under the same name by W., brother of the legatee, and the acting executor. During the eighteen months between the death of the testator and the payment of the legacy, certain sums of money were paid to T., amounting to \$164,000, nominally by G. & Co., but which were, in fact, payments on account of the legacy. At the end of the eighteen months the balance of the legacy was credited to T. as payment in full. *Held*, that no interest was properly chargeable on such advances. *Id.*
15. The will of P., executed in 1871, after various legacies which he directed to be paid out of a certain fund, gave a legacy of \$10,000 to the testator's sister E., the directions for the payment of which were as follows: "To be paid by my executors when it shall be convenient for them, without regard to the time fixed by law, out of the moneys derived from the sale of the Van Schaick farm, * * * or otherwise, as it shall seem best to them. It is further my will that this legacy shall be deemed subservient to all others." Following this was a gift of the residuary estate. The testator had, previous to the execution of the will entered into a contract with agents for the sale of the farm mentioned, in city lots. He died in March, 1873. Previous to June, 1874, there had been paid over to the sole acting executor, or upon his order to the residuary legatee, over \$15,000 of proceeds "derived from the sale" of said lots, and said legatee received more than sufficient to pay the legacy to E. In an action against said executor and legatee for an accounting and to compel payment to E. of said legacy, *held*, that by the will the legacy was charged upon the land specified and the proceeds of the sale, which not only stood as security, but were to be deemed the primary fund from which such payment should be made; that when the residuary legatee took the land and its proceeds she took it *cum onere*, and having accepted the devise must discharge the obligation resting upon it; that the provision making the legacy "subservient to all others" did not include the residuary gift, but simply the general legacies; and that the "convenience" referred to respected the situation of the estate, not the choice or arbitrary will of the executor, and when all the other general legacies were paid, leaving a surplus of the general fund intact for the residuary legatee, and there remained sufficient from the farm sales to pay the legacy to E., it became due and payable, and both the executor, who had misappropriated the money and the residuary legatee who had wrongfully accepted it, became liable for its payment, although there remained unsold of the farm lands sufficient to pay the legacy. *Van Rensselaer v. Van Rensselaer.* 207
16. Also, *held*, that plaintiff was entitled to interest from the time when sufficient of the proceeds of the farm sales had been realized to pay her legacy. *Id.*
17. The will of A. devised and bequeathed all his real and personal property, after the payment of debts and funeral expenses, to his executors, in trust, to invest and keep invested the proceeds in certain specified interest-bearing securities, to pay the income of a certain small part thereof to his mother during life, and the balance to his widow during life, including that bequeathed to the mother after her death, and after the death of the wife the remainder over to the testator's surviving children, share and share alike. In an action for the construction of the will, it appeared that the widow and two children survived him, one of whom died thereafter and before the commencement of the action. The widow claimed the benefit of the provision made for her in the will and also dower in the testator's real estate, and that upon the death of her child, she as next of kin, became entitled to one-half of the remainder provided for each child and to an absolute interest in possession of one-quarter of the estate by reason of a merger

of her legal and equitable interest therein. *Held*, untenable; that the creation of a trust for her life was inconsistent with an implied right on her part to manage and control any part of the estate; that from the fact that the testator gave her the income of all his estate it was to be implied that he did not expect her also to take dower; and that the will indicated the testator's intent that all his property should be converted into money; that the widow's interest in the trust estate did not merge in that acquired on the death of her child; that there could be no merger because of the existence of the trust estate. *Asche v. Asche*.

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18. Where there is a manifest incompatibility between the provision for a widow in a will and dower, the widow is put to an election between them. *Id.*

19. Also, *held*, that the widow by the death of her child acquired a future estate, dependent upon the precedent estate of the trustees, which may be devised but cannot be enjoyed in possession; that it was the intent of the testator to put the *corpus* of the fund beyond the hazard of impairment and waste during the life of his widow, and this could not be defeated or affected by the acquisition by her of the estates in remainder. *Id.*

20. The necessity of a conversion of realty into personalty, to accomplish the purposes expressed in a will, is equivalent to an imperative direction to convert, and effects an equitable conversion. *Id.*

21. The will of R., after giving certain specific legacies, gave to his executors his residuary estate in trust, with power to receive the rents and profits, sell and convey the property, invest both the rents and profits and proceeds of sale "and to divide and apply the same and income thereof" as directed, *i. e.*, to apply the income of two-sixths of "said residue and remainder" to the use of his wife for life, with remainder over to his children,

and to apply the income of one-sixth to each of his four children during life, with remainder over to the issue of such child, and with authority to advance to each child a specified sum out of the principal if the executors should deem best. In the gift of the legacies the testator used the words "give and bequeath," in those of the residuary estate the words used were "devise and bequeath." *Held*, that the final and ultimate division did not require a conversion of the land into money, nor was such a conversion required as respects the intermediate income; that, therefore, the remaindermen took a vested interest in the lands; and that the interests of the grand-children were not cut off by a foreclosure suit, to which they were not made parties. *Scholle v. Scholle*. 261

22. When the mortgage which was foreclosed was assigned to S., the plaintiff in the foreclosure suit, R. guaranteed the payment of one-half thereof. After R.'s death S. presented a claim to his executrix, who alone qualified and acted, for one-half, which was disputed. S. then began the foreclosure; the executrix was made a defendant and answered. Pursuant to an arrangement between her and S. she withdrew her answer and executed a deed to S. of R.'s entire interest. S. in return withdrew his claim against the estate and on the foreclosure sale bid in the property for the full amount of the mortgage. *Held*, that the deed was not a good execution of the power of sale and was invalid, as there was no sale such as the will contemplated, but an appropriation of the land to pay a debt, chargeable primarily upon the personal property, without an order of the surrogate or proof that the personalty was insufficient to pay debts; also, that the surrogate was powerless to appropriate the land to the payment of debts except in the statutory method. *Id.*

23. The will of D., and a codicil thereto, gave his residuary estate to his executors in trust, to apply it, or the proceeds of sale, which

they were empowered to make, to the establishment and endowment of a charitable institution, whose object and the class of persons to be relieved and benefited thereby should be the same as a charitable institution named. The executors were authorized and directed to apply for and obtain from the state legislature, "as early as practicable," an act of incorporation of such an institution, and to do this, if possible, within ten years after his decease. In the event that the gift "should be adjudged or proved invalid or its execution be impossible, either by judicial decision or from any other cause," the testator directed that all his residuary estate should be sold and the proceeds equally divided among certain existing religious and charitable corporations named, all of whom had capacity to take. In an action for the construction of the will, *held*, that the primary gift was invalid, as there was contemplated a period measured by years, not by lives, during which there would be no person in existence by whom an absolute estate in possession could be conveyed, and so there was an unlawful suspension of the power of alienation; also, that the gift was not saved by the fact that an institution, such as contemplated by the testator, could have been incorporated under the general law, as such a corporation was not intended or directed, but one formed under a special charter; also, that if the will should be construed as working an equitable conversion of the real estate into personalty this would not affect the question, because considering it as personalty, the prohibition of the statute against a suspension of the absolute ownership of personal property for more than two lives would apply. *Oruikahank v. Home for Friendless.* 387

24. But, *held*, that the alternative and substituted gifts were valid; and that they took effect and the property vested in the beneficiaries named at the death of the testator. *Id.*

25. By the codicil the testator gave to a sister, E., two lots of land.

Shed died during his lifetime. *Held*, that the lapsed devise went into the residue. *Id.*

26. The common-law rule that lapsed devises do not fall into the residue, but go to the heirs as undisposed of by the will, was done away with by the Revised Statutes (2 R. S. 57, § 5), and there is now no difference between lapsed devises and lapsed legacies, as it respects the operation upon them of a general residuary clause. *Id.*

27. Also, *held*, that, as in the event which has happened, of the vesting of the residue in the corporations named, there was an imperative direction for the conversion of the real estate into money, and a gift of the proceeds, rents and profits went with the residue to the legatees. *Id.*

28. The will of B. directed his executors to divide his residuary estate into a certain number of equal shares, one of which he gave to each of the children living at the time of his death, of six deceased brothers and sisters named. Then followed this provision: "In case any one or more of the children of either or any of my deceased brothers and sisters mentioned in this clause of my will, shall die or have died before me leaving lawful issue surviving at the time of my death, then and in that case such issue of my deceased nephew or niece shall receive the share which his or her ancestor would have received under this clause of my will had she or he been living at the time of my death, excepting in the case of the issue of Lemuel Crawford, deceased, to whom this clause shall not apply. The children of the said Lemuel Crawford, deceased, having been left a legacy in a former clause of this will." Said Lemuel Crawford was a son of a sister of the testator, to whose children a sixth was given. Prior to the making of the will several of the children of the testator's brothers and sisters, named in the residuary clause, had died leaving issue who survived the testator. *Held*, that the provision was not strictly substitutionary, and the

- said issue took, irrespective of the time of the death of their parents, the share their parents would have been entitled to had they survived the testator, they taking as primary legatees, not as representatives by way of substitution to interests given in the prior clause. *In re Crawford*. 386
29. The cases bearing on the question of construction considered and classified. *Id.*
30. Except in one instance specific legacies were given to the issue of nephews and nieces who had died before the making of the will; the amounts of these legacies, however, were not uniform or identical in amount with what they would take under the residuary clause, and they were smaller than the legacy given to Lemuel Crawford. *Held*, the fact that the testator excluded the issue of the latter from participating in the residuary estate because of the prior provision for them, did not exclude other issue similarly situated, as the will showed the intent that they should be included. *Id.*
31. The will of C. gave one-eighth of her residuary estate to each of five persons named, "to have and to hold the same to them, their heirs and assigns, forever." Four of the beneficiaries died before the testatrix. She left neither parent nor descendant. The entire estate had come to the testatrix from her deceased husband; the five persons so named were his brothers and sisters, the balance of the residuary estate was given, one-eighth to the children of each of two brothers and a sister, deceased. In other clauses of the will provision was made that in case of the pre-decease of a donee his descendants should take. *Held*, that the gifts to the four deceased beneficiaries lapsed; that the addition of the word "heirs" did not show a contrary intent; and that, as the words of the will were clear and unambiguous, the extrinsic circumstances could not properly be resorted to to change or modify that meaning. *In re Wells*. 396
32. The rule of the common law that a legacy or devise, given with or without words of limitation, lapses in case of the death of the devisee or legatee before the testator, in the absence of express words to prevent a lapse, or of something in the context of the will indicating a contrary intent, is still in force in this state, save so far as modified by the Revised Statutes (2 R. S. 66, § 52), *i. e.*, where the devise or bequest is to a child or descendant of the testator. *Id.*
33. The fact that words of inheritance are now unnecessary to convey a fee does not justify the construction that their use in a will is expressive of an intention that they shall be taken as words substituting in place of a pre-deceased legatee or devisee, his heirs; having a well settled and understood meaning, a different meaning may not be given to the words. *Id.*
34. The will of T. gave his residuary estate to trustees in trust, to pay one-half of the net profits and income of the real estate to the testator's wife, for the support and maintenance of herself and the testator's minor children, and to apply the other half in payment of mortgages upon the real estate, and after such payment to invest the residue for the benefit of his children. The trustees were authorized to take charge of the testator's store, stock in trade, etc., to continue the business until the youngest child should arrive of age, and invest the net proceeds; also to sell the personal estate, convert it into money and invest the same for the benefit of his children. Then, after providing for an advancement to each of his children when they respectively arrive of age or marry, the clause continued thus: "Immediately upon the arrival of my youngest child at the age of twenty-one years, in case my said wife shall not then be living, to divide all my estate, real and personal, and the accumulations of interest equally among my children, share and share alike, after deducting all advances made as above provided to any of my children, so that each of my chil-

children shall have and receive an equal share of my estate." In an action to obtain a judicial construction of the will, it appeared that one of four infant children living at the time of the testator's death had since died under age and without issue. *Held*, that the gift was not to the children as a class, but each took a vested remainder in one-fourth of the residuary estate dependent upon the termination of the trust, and that the share of the one who died, with the accumulations of income therefrom, descended to his heirs or next of kin, according to the nature of the property; also, that such descendants were entitled to any income that may hereafter accrue during the trust period. *Goebel v. Wolf*. 405

35. The general rule that when a testamentary gift is found only in a direction to divide at a future time, the gift is future and contingent, and not vested, is subordinate to the primary canon of construction, that the construction shall follow the intent to be collected from the whole will. *Id.*

36. De B. died in 1878, leaving a widow, but no descendants. By his will he gave his residuary estate to trustees named, in trust, to apply the rents, income and profits to "the sole use" of his wife during her life; after her death he directed his trustees to pay out of the capital of the trust estate certain legacies "and to convey, transfer and distribute the remainder of the capital" to certain persons named. He empowered the trustees "to sell the whole or any part of the real estate belonging to such trust estate." He directed that "the proceeds of such sales * * * shall be held and managed by the said trustees * * * upon the same trusts and for the same purposes and be disposed of in the same manner as such real estate would in case of no such sale." It was provided, however, that the trustees should not sell the testator's farm during the lifetime of his wife except with her consent, to be signified by her joining in the deed, and that she

should be permitted to use and occupy the farm free of rent so long as she lived. He also directed the trustees during the time that his wife so used and occupied the farm to pay out of the estate "all taxes upon said farm and the expenses of keeping the buildings thereon in proper repair, and all other expenses attending the proper upholding and maintaining of the same, and also the interest upon any and all mortgages which shall be upon said farm at the time of his death." During the widow's lifetime the trustees paid the interest accruing upon a mortgage on the farm and the insurance premiums, taxes, etc., from the income of the estate in their hands. On their accounting these charges were objected to by the executors of the widow on the ground that the items were chargeable to the capital of the estate. *Held*, untenable; that the words, "pay out of my estate" were not, in themselves, sufficient to support the construction contended for, as the other parts of the will disclosed an intention to preserve intact the *corpus* of the estate for the ultimate disposition arranged with respect thereto upon the death of the life-tenant. *In re Albertson*. 484

37. To sustain a construction of a will, whereby the capital of a trust fund may be impaired by using it in payment of taxes and of interest on mortgages and in maintaining the realty used by the life-tenant, it must contain words of the most unmistakable import pointing unequivocally in that direction. *Id.*

38. The will of C. directed that \$100,000 should be invested and the income thereof paid to his wife during her life; upon her death the principal to be paid to H., the testator's adopted son, if he shall then have arrived at the age of twenty-eight years; if not, it was to be kept invested and the income applied to his use until he arrived at the age of twenty-eight, and then the principal, with any accumulations of income, to be paid to him. In case of his death before arriving at that age, without leaving lawful

- issue, the will directed that said principal should be divided among certain beneficiaries named; if he left lawful issue, then said sum was directed to be paid to such issue. The residuary clause of the will provided as follows: "All the rest, residue and remainder of my estate, real and personal, wheresoever and whatsoever, and such as I shall hereafter acquire, I do give, devise and bequeath to my adopted son, * * * to be paid over to him when he shall have arrived at the age of twenty-eight years." Following this were provisions disposing of the residuum in case of the death of H. before reaching the age of twenty-eight. C. died, leaving his widow and H. surviving him. H. died after reaching the age of twenty-eight; the widow surviving him. On an application of the executors of C. for a settlement of their accounts, certain of the latter's next of kin appeared and filed objections thereto, which were overruled on the ground that they were not interested in the estate. *Held*, no error; that H. took a vested interest in remainder in the \$100,000, if not by virtue of the clause setting it apart, at least under the residuary clause. *In re Crossman*. 508
39. The will contained no direction as to the disposition of the income of the residuary estate until H. reached the age of twenty-eight. *Held*, that, under the Revised Statutes (1 R. S. 726, § 40), the rents and profits of the real estate were payable as they accrued to H., he being presumptively entitled to the next eventual estate, and so far as the residuary estate was personal, its income belonged to H. as the owner of the *corpus* thereof, and was payable to him as it accrued. *Id.*
40. T. deposited certain moneys in a bank and in a trust company to the credit of his daughter C. The first deposit was made in her presence and for her personal use. The deposits were entered in a pass-book which was delivered by T. to C. The latter drew out the deposits in bank and deposited them in the trust company, where they were included in the account with the deposit then made by T. T. left a will, executed after all of the deposits, except one small one, were made, by which various legacies were given to C. *Held*, that there was no ademption of the legacies by the gift of the moneys deposited nor were they adeemed *pro tanto* by the deposit made after the execution of the will. *In re Crawford*. 560
41. Where a will gave the testator's residuary estate to his executors in trust, with authority to sell the real estate and to divide the whole into specified parts, each to be kept invested and the income paid to a beneficiary named during life, *held*, that upon the division the duties of the executors, as such, ceased, and they held the property as trustees; and so they were entitled to double commissions. *Id.*
42. Although a gift by express terms is not made in a will, a legacy by implication may be upheld where the words of the will leave no doubt of the testator's intent and can have no other reasonable interpretation. *In re Vowers*. 569
43. V. died, leaving a widow, but no children. His will, after a provision made for his wife, contained this clause: "This provision to be accepted by my wife in lieu of her dower right *und distributive share in my estate*, she to make her election, whether she accepts this provision of my will, within sixty days from the time of proving the same." The widow within the time specified made her election, rejecting the provision. The residuary estate was given to a nephew of the testator. In proceedings for the probate of the will, *held*, that, aside from her dower right, the widow was entitled to such share of the personal estate as the law would have given her had the deceased died intestate. *Id.*
44. The executor claimed that the widow had no right to raise the question of construction, upon probate of the will, as it involved both real and personal estate. *Held*, untenable; that the widow

simply put in issue a disposition of personal property, and such a disposition the Code of Civil Procedure (§ 2624) permits a party to put in issue upon probate. *Id.*

45. *It seems* the intention of a testator to confer on his executor power to continue a trade or business will not be deemed to have been conferred unless it is found in the direct, explicit and unequivocal language of the will. *Willis v. Sharp.* 586

46. *It seems*, also, that when the power *simpliciter* is conferred, it only authorizes the use of the fund invested in the business at the time of the testator's death; the general assets may not be used unless such an intent on the part of the testator is expressed in the will. *Id.*

47. When such an intent does not appear a creditor has no remedy except to pursue the assets embarked in the trade or business at the time of the death. *Id.*

48. A testator may, however, bind his general assets for all of the debts; and where such an intent finds expression in his will, in case of the insolvency of the executor, the general assets may be made liable in equity for the debts. *Id.*

49. The will of S., after providing for the payment of debts, etc., gave all her property to her executors, in trust, to apply the income therefrom to the education and maintenance of her only son until

he should arrive at the age of twenty-five years, the property and accumulations to be then divided equally between her son and husband, with cross-remainders in case of the death of either prior to the time of division. She directed that after her death some legitimate business should be carried on by her executors for the benefit of her son, of which her husband should be retained as manager at a yearly salary. Then followed this provision: "I do hereby authorize and empower my executors to sell or make such other disposition of my real and personal estate as the safe conduct of such business shall seem to them to require." The testatrix at the time of her death was engaged in the merchant tailoring business, which was carried on by defendant, her husband; he was one of the executors, and alone qualified, and continued the business after the death of his wife. Plaintiffs sold and delivered to defendant, as executor, certain goods for the purposes of said business. In an action to compel defendant to pay the purchase-price of the goods out of the assets of the estate in his hands, the complaint set forth the foregoing facts, and alleged that, individually, he was irresponsible. *Held*, that plaintiffs were entitled to the relief sought; that the provisions of the will indicated unmistakably an intention on the part of the testatrix to subject her general assets to the debts of the business and to authorize her executors to contract debts therein binding her general estate. *Id.*

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